Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

AMERICAN JEWISH CONGRESS,

Petitioner,

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: August 30, 2005

QUESTIONS PRESENTED

1. Whether that portion of *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) which precludes the government from subsidizing sectarian school teachers who indoctrinate elementary and secondary school students in religion remains valid law.

2. Whether a program under which the federal government chooses through discretionary grants to fund and sponsor religious groups that place federally subsidized religion teachers in sectarian elementary and secondary schools can properly be characterized as a program of "true private choice" under *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

3. Whether the established line of this Court's cases precluding the federal government from providing direct cash payments to religious groups without requiring any accounting or monitoring of the funds to ensure that they are used solely for secular purposes remains binding authority.

PARTIES TO THE PROCEEDING

The Petitioner is American Jewish Congress ("AJC"), a non-profit organization whose goals include protecting fundamental constitutional freedoms and American democratic institutions, particularly the civil and religious rights and liberties of all Americans and the separation of church and state. Respondents are the Corporation for National and Community Service ("Corporation") (the Defendant) and the University of Notre Dame ("Notre Dame") (the Defendant-Intervenor).

STATEMENT PURSUANT TO RULE 29.6

American Jewish Congress does not have a parent company. There are no publicly held companies that have a 10% or greater ownership interest in American Jewish Congress.

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Petitioner AJC respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the District of Columbia Circuit (Pet. App. A) reversing the District Court is reported at 399 F.3d 351. The District Court's opinion (Pet. App. B) granting summary judgment to AJC is reported at 323 F. Supp. 2d 44. The District Court's order dated August 5, 2004, enforcing the rulings set forth in that opinion, is not reported and is reproduced at Pet. App. C.

JURISDICTION

The Court of Appeals denied without opinion AJC's timely filed petition for rehearing *en banc* on June 1, 2005. (Pet. App. D) This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Establishment Clause of the First Amendment to the Constitution of the United States is at issue in this case. That Clause provides that "Congress shall make no law respecting an establishment of religion ...." U.S. Const. amend. I.

Although AJC's request for relief is premised solely on the government's violation of the Establishment Clause, statutory and regulatory authority relating to the program at issue in this case include 42 U.S.C. § 12634, 42 U.S.C. § 12635, 45 C.F.R. § 2520.30 (2001), and 45 C.F.R.

§ 2520.30 (2002). Those authorities are reproduced at Pet. App. E.

INTRODUCTION

This case involves three constitutional questions, each of extraordinary significance, arising from the Court of Appeals' failure to follow established authority limiting government funding and sponsorship of religion. In the challenged program, the federal government is funding and sponsoring AmeriCorps teachers who engage in religious indoctrination of elementary and secondary students in parochial schools. The federal government chooses religious groups, through a discretionary process, that recruit and train those teachers in how to inculcate religion in their sectarian school placements. The government provides direct cash funding to the religious groups to help them recruit and train the teachers. It then pays the religion teachers what is effectively a salary supplement – a practice that has been barred since this Court's decision in *Lemon v. Kurtzman*, 403 U.S. 602, 606, 608 (1971).

Usurping this Court's prerogative, the Court of Appeals declined to apply the well-established precedent prohibiting such government sponsorship of religious indoctrination. *See School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985). Asserting that such precedent no longer has force, and relying instead on *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Court of Appeals reversed the District Court's judgment finding the federal government's practices unconstitutional. The Court of Appeals' decision to overstep the bounds of this Court's precedent has potentially broad-ranging implications concerning the administration of federal programs – and the broader relationship between church and state in our nation. Review by this Court is needed to reinforce the crucially important constitutional limits of government sponsorship

and funding of religious indoctrination in this program and in the future. Delineating those limits is especially important now, in light of the Administration's "Faith-Based and Community Initiative."[1]

STATEMENT OF THE CASE

I. The AmeriCorps Education Awards Program And Grant Process

The federally chartered Corporation administers the AmeriCorps Education Awards Program, a program among whose purposes is to support the placement of teachers in public and private schools that have reported teacher shortages. (Pet. App. 15a, JA0749, JA1191) Qualifying teachers in the program are entitled to receive a federal Education Award of $4,725, which can be used for student loan forgiveness or for other prescribed purposes. (Pet. App. 16a, JA1191) A prerequisite to eligibility for an Education Award is completion of a minimum of 1700 hours of service. The Corporation obligates AmeriCorps participants to document the time counted towards that minimum hours requirement on timesheets. (Pet. App. 28a, JA1224,

The Education Awards Program is largely administered through grantees chosen by and funded by the Corporation. (Pet. App. 16a, JA0037) In order to distribute limited Congressionally authorized funds among applicants, the Corporation reviews applications and chooses through a subjective process which groups to fund. (Pet. App. 16a-18a, JA1194) The selection criteria that the Corporation uses to make decisions regarding which groups to fund are, the District Court concluded, "highly discretionary." (Pet. App. 43a) These criteria include, for example, whether the

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[1] The White House's description of its Initiative can be accessed on the World Wide Web at http://www.whitehouse.gov/government/fbci/.

group has a "[s]trong community partnership[], including well-defined roles for faith- or community-based organizations." (Pet. App. 18a, JA0844)

If the Corporation chooses a group to serve as an AmeriCorps grantee, the Corporation charges that grantee with the responsibility to recruit and train a specified quota of AmeriCorps participants to serve in the program that the group administers. (Pet. App. 19a, 46a, JA0746, JA0772-74) As a practical matter, an AmeriCorps participant who wishes to participate in the Education Awards Program, and to be eligible for an Education Award, may only do so through an approved, grantee-administered program. (Pet. App. 19a-20a, JA1655-57)

II. The Religious Groups That The Corporation Has Chosen As Grantees

The Corporation has chosen through this grant process to fund certain religious organizations. According to the groups' own public statements (of which the Court can take judicial notice), the six "faith-based" grantees in the AmeriCorps Education Awards program selected by the Corporation for fiscal year 2004 all identify themselves with Christian faiths. (JA1663, Addendum to Appellate Br. of *Amicus Curiae* in Support of Affirmance) Among those religious organizations that place the largest number of AmeriCorps participants as teachers in religious schools are Notre Dame and the Catholic Network of Volunteer Service ("CNVS"). (Pet. App. 21a, JA0759)

A. Notre Dame's ACE Program

The Alliance for Catholic Education or "ACE" program is an AmeriCorps Education Awards program operated by Notre Dame, a private Catholic university located near South Bend, Indiana. (Pet. App. 24a) One of

the "pillars" of the ACE program is "spirituality." (Pet. App. 24a, JA1048-49) The ACE program includes a 12-step series of retreats designed "[t]o harness and more effectively embody and communicate the key themes related to Christ Teacher." (Pet. App. 25a, JA0475, 1053-54) During the school year, ACE participants are required to live in "intentional Christian communities" of four to seven people. (Pet. App. 25a, JA1054)

Prior to their placement in parochial schools, ACE participants must take part in a "summer program" designed to prepare them for their placements as teachers. (Pet. App. 24a, JA1052) A number of the courses that are taught during the summer program have religious content. (Pet. App. 25a, JA1069) Courses offered in the summer program have included, for example, "Becoming Educators in Faith: Catechesis in Catholic Schools" and "Teaching Religion in Catholic Schools." (Pet. App. 25a, JA0704)

Following completion of the summer program, each ACE participant is assigned to teach in a Catholic elementary or secondary school. (JA0887) Approximately 50% of ACE participants are assigned to teach religious subjects in their placements. (Pet. App. 24a, JA0889)

B. Catholic Network Of Volunteer Service

CNVS is an "umbrella" organization that is composed of more than 200 member programs, of which approximately 80% are Catholic. (Pet. App. 26a, JA1295) AmeriCorps participants affiliated with CNVS programs are placed in approximately 200 religious schools. (JA1295-96) Approximately 30% of the AmeriCorps teachers serving through CNVS-affiliated organizations teach religious subjects. (Pet. App. 26a, JA0722)

CNVS-affiliated programs identified through a search conducted by AJC in the organization's Internet recruitment directory under the heading, "Religious Education and Retreat Work" revealed many programs through which AmeriCorps Education Awards were available. Although the Corporation's governing statute precludes discriminatory selection of participants, *see* 42 U.S.C. § 12635, the descriptions for several CNVS member organizations posted in the CNVS directory required that participants in the programs be members of particular religious faiths. (Pet. App. 26a-27a) The Corporation did not discover, or take any action to remedy, these groups' policies until AJC brought the issue to its attention through litigation. *Id.*

III. Religious Instruction By AmeriCorps Participants In Their Placements

Under the Education Awards Program, hundreds of AmeriCorps participants serve in sectarian schools each year. (Pet. App. 21a, JA0888, 1296) It is undisputed that many AmeriCorps participants teach religion in sectarian elementary and secondary schools, lead the students in prayer, and engage in other religious activities with the students during the school day. (Pet. App. 33a)

For example, two AmeriCorps participants that AJC learned about in discovery – Kelly Stoltz and Jennifer B'Oris – taught in a parochial elementary school in Boston during the 2002-2003 school year. (Pet. App. 31a, JA0644-46, 1392-93, 1395)

Ms. Stoltz taught pre-kindergarten classes. She spent about 15 minutes per day in religious instruction of the students. This religious instruction was integrated throughout the school day. Ms. Stoltz also led the pre-kindergarten students in prayer in the morning before snack, at lunch, at nap-time, and dismissal. There were religious

symbols displayed in Ms. Stoltz's classroom, such as a crucifix and religious statues. As encouraged by the AmeriCorps program, a sign bearing the AmeriCorps logo was displayed at the doorway to her classroom. An AmeriCorps sign was posted by the entranceway to the school. (Pet. App. 31a-32a, JA0649, 1392-94)

Ms. B'Oris taught a class of third grade students. She conducted 30 minutes of religious instruction each day. She also led the students in prayer before school started, before lunch, and at the end of the school day. As in Ms. Stoltz's classroom, there were religious symbols displayed in Ms. B'Oris' classroom. An AmeriCorps sign was similarly posted outside Ms. B'Oris' classroom. (Pet. App. 31a-32a, JA0648-49, 1395-96)

The AmeriCorps signs posted outside these classrooms are part of the concept of "AmeriCorps Identity" – the Corporation's policy of encouraging AmeriCorps participants to identify their affiliation with the government-sponsored program. (Pet. App. 22a-24a) For example, the Corporation requests that "[a]ll Site Supervisors ... post an AmeriCorps sign or banner in their offices or facilities. It should be within the vicinity of wherever you[r] member is located, so members of your staff and service community can identify the member's participation in AmeriCorps." (Pet. App. 23a, JA0922)

The Corporation amended one of its governing regulations, effective in August of 2002, explicitly to permit AmeriCorps participants to teach religion and lead prayer during their placements so long as they do not record such religious activity on their Corporation "timesheets."[2] Under

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[2] *Compare* 45 C.F.R. § 2520.30 (2001) (Pet. App. E) *with* 45 C.F.R. § 2520.30 (2002) (Pet. App. E). These timesheets are not reviewed by the Corporation's Education Awards staff except when a site visit is

the policy memorialized in its amended regulation, the government thus attempts to suggest that it is not funding or sponsoring religious instruction by keeping "off the books" the teaching of religion by AmeriCorps members during their period of service. Nevertheless, under the Corporation's policy, both religious and secular instruction are conducted by the same AmeriCorps teachers, in the same classrooms, during the same school day – and in some cases even during the same classroom period.

IV. The Corporation's Direct Funding Of Religious Groups

The Corporation pays the religious grantees like ACE and CNVS that it picks through its discretionary grant process direct cash funding in an amount equal to $400 per year for each full-time equivalent AmeriCorps participant that they enroll. (Pet. App. 34a, JA0748) In the first four years of its grants, for example, CNVS received direct funding totaling more than $3 million, which the group placed in its general checking account. (Pet. App. 34a, JA0234, 0299, 0383, 0440, 1303-04)

The Corporation argues that this money is meant only to pay for the secular costs of administering the program, and not the religious training of the AmeriCorps teachers or other religious aspects of the programs. However, the Corporation acknowledges that it does not require its grantees to account for the use of these funds, and therefore has established no mechanism to ensure that the federal funding is not used to pay for religious training and activity. (Pet. App. 34a, JA0748) Rather, the Corporation operates under the

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conducted to the school. (Pet. App. 28a, 30a, JA1224-25) Those few site visits – conducted at only a tiny percentage of the schools each year – are announced ahead of time, so that the host sites can get their paperwork in order prior to the visits. (Pet. App. 30a, JA1215, 1359)

"expectation" that the amount of the grants will exceed the secular costs of administering the program. (Pet. App. 34a, JA0076-77, 0748)

V. Procedural History

After learning that federally funded AmeriCorps participants might be teaching religion, AJC asked the Corporation in the spring of 2001 whether this was so. At first, the Corporation responded that "the Corporation ... does not allow AmeriCorps members to teach religion." (JA0451) This position was in keeping with the Corporation's relevant governing statute and regulation at that time.

Notwithstanding the statute and regulation, AJC learned that AmeriCorps participants were teaching religion and leading their students in prayer during the school day in the sectarian schools in which they were placed. Indeed, the Corporation amended its governing regulation, effective in August of 2002, explicitly to permit AmeriCorps participants to teach religion and conduct prayer during their placements so long as that religious activity was not recorded on the participants' timesheets. After the Corporation refused voluntarily to prohibit AmeriCorps teachers from engaging in religious instruction in their placements in response to AJC's request, AJC filed its complaint with the United States District Court for the District of Columbia in October of 2002.

Following substantial written and deposition discovery, AJC filed a motion for summary judgment with the District Court in December of 2003. Both the Corporation and Intervenor Notre Dame also filed summary judgment motions. In an opinion dated July 2, 2004, the District Court set forth at length the undisputed facts that

served as a basis for its decision and fully analyzed all of the pertinent legal arguments:

First, the District Court's decision rejected the Corporation's argument that the government funding was limited only to AmeriCorps participants' secular activity and not their religious instruction. Rather, the District Court found that "[t]he line between the two has become completely blurred." (Pet. App. 14a)

Second, the District Court held that the program at issue was not governed by *Zelman* because, among other things, the government "uses highly discretionary criteria – as opposed to fixed, objective, measurable criteria – to pick and choose among potentially qualifying AmeriCorps ... grantees." (Pet. App. 43a)

Third, the District Court found unconstitutional the government's direct funding of religious groups that it had chosen as grantees, stating that "[t]he Corporation's 'expectation' that the grantees will spend the direct monetary grants on secular administrative costs – without actually requiring any segregation or accounting for the use of the grants – is not sufficient to render the grants constitutional." (Pet. App. 52a-53a) (citing *Comm. for Pub. Educ. & Rel. Liberty v. Nyquist*, 413 U.S. 756, 778 (1973))

Accordingly, the District Court granted AJC's motion for summary judgment and denied the Appellants' cross-motions. After further briefing, on August 5, 2004, the District Court entered an injunction enforcing its decision. (Pet. App. 56a) That injunction was subsequently stayed by the District Court pending appeal. The Corporation and Notre Dame both appealed the District Court's orders to the United States Court of Appeals for the District of Columbia Circuit, which reversed the District Court:

First, the Court of Appeals declined to import any significance to the "blurring" of the line between religion and secular instruction that the District Court had found. The Court of Appeals concluded instead that the relevant portion of *Ball* relied on by AJC as giving force to those concerns was no longer binding – not because it has been explicitly overruled by this Court, but because "[m]uch of the reasoning in *Ball* has been overturned." (Pet. App. 6a)

Second, the Court of Appeals held the program at issue to be one of "private choice" because AmeriCorps participants had a sufficient number of secular service positions available to them. (Pet. App. 10a) Contrary to the District Court's decision, it found irrelevant to the constitutional inquiry that the government had broad discretion to select the religious groups that recruited and trained those participants and placed them as religion teachers in sectarian schools. (Pet. App. 8a)

Third, without addressing the Supreme Court authority relied upon by the District Court, the Court of Appeals sustained the government's direct funding of religious grantees despite the lack of any government accounting or monitoring of the use of grant funds. (Pet. App. 11a-12a) Instead, the Court of Appeals reasoned that the grants were constitutional because the amount of the funds did not exceed the programs' projected secular costs. (Pet. App. 11a-12a) (citing *Comm. for Pub. Educ. & Rel. Liberty v. Regan*, 444 U.S. 646 (1980))

Following the decision, AJC filed a petition for rehearing *en banc*, which the Court of Appeals denied. By this Petition, AJC now seeks review of the Court of Appeals' decision by this Court.

REASONS FOR GRANTING THE WRIT

Summary

This Court has held that the government cannot provide sponsorship and funding to sectarian school teachers who, in addition to the secular instruction that the government supports, are teaching young students religion and leading them in prayer. *Ball*, 473 U.S. at 397. However, the Court of Appeals brushed aside *Ball* by concluding that even that portion of the decision relevant to this case had been undermined by the reasoning of subsequent cases. (Pet. App. 6a) This Court should grant the Petition to make clear that the holding of *Ball* that forbids the federal funding of sectarian school teachers who indoctrinate impressionable elementary and secondary school students in religion has never been overturned.

Instead of adhering to the viable aspects of *Ball*, the Court of Appeals adopted the government's exaggerated view of *Zelman*, 536 U.S. at 649. Unlike in *Zelman* and its antecedents, here the federal government selects a limited number of grantees through a highly discretionary grant process, using vague and ill-defined grant criteria. The Petition should be granted to determine the extent to which such programs involving substantial government discretion can be immunized from challenge as programs of "true private choice."

Finally, the Court of Appeals incorrectly concluded that the government may furnish cash funding to religious groups that recruit AmeriCorps teachers and provide them religious training, without requiring those groups to account for the use of the federal funds to ensure that they are used only for secular purposes. Permitting the government to provide direct cash aid to religious groups without any tangible restrictions on use of the aid is inconsistent with a

long line of this Court's precedent. The Court should grant this Petition and should demarcate the proper boundaries of federal funding of religious institutions.

I. This Court Should Grant The Petition To Make Clear That *Ball* Precludes The Government From Funding Sectarian School Teachers Who Teach Religion In Sectarian Elementary And Secondary Schools

In a single sentence, the Court of Appeals cast aside this Court's governing decision in *Ba.* concluding that "[m]uch of the reasoning in *Ball* has been overturned." (Pet. App. 6a) (citing *Agostini v. Felton*, 521 U.S. 203, 236 (1997)) However, the part of *Ball* relevant to this case has pointedly not been overturned. *Agostini*, 521 U.S. at 235. The Court of Appeals' conclusion thus runs directly contrary to this Court's admonition in *Agostini* that Courts of Appeal may not take on the responsibility of declaring Supreme Court precedent to have been overruled by implication.[3] This Court should grant the Petition to make clear that *Ball* continues to preclude the government from operating programs that subsidize the salaries of sectarian school teachers who engage in religious indoctrination of young elementary and secondary students – and to emphasize that the Court of Appeals had no authority to hold otherwise.

In *Ball*, this Court found two government programs to violate the Establishment Clause. Only that portion of the *Ball* opinion addressing one of these programs, the "Shared

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[3] *See Agostini*, 521 U.S. at 237 ("If a precedent of this Court has direct application in a case ... the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions") (quotation omitted). *See also Tenet v. Doe*, __ U.S. __, 125 S. Ct. 1230, 1237 (2005) (quotation omitted) (same); *State Oil v. Khan*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents.").

Time" program, was subsequently overruled in the Court's 1997 opinion in *Agostini*, 521 U.S. at 235 ("[W]e must acknowledge that ... the portion of *Ball* addressing Grand Rapids' Shared Time program, [is] no longer good law."). *Ball*'s holding with respect to the other program – the "Community Education" program – remains binding precedent.

The "Community Education" program involved secular classes held at the conclusion of the regular school day in private schools, including religious schools. *Ball*, 473 U.S. at 376-77. Most of the instructors that were hired by the school district to teach the after-school classes were teachers who were otherwise employed full-time by the same private schools where the Community Education classes were held. *Id.*

The Court held the Community Education program to violate the Establishment Clause. In doing so, it explained that, in this environment, "the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes, even if the latter were successfully kept free of religious indoctrination." *Id.* at 391. The Court also reasoned that, even assuming that the publicly funded classes were entirely secular, this arrangement constituted "a powerful symbol of state endorsement and encouragement of the religious beliefs taught in the same class at some other time during the day." *Id.* at 392.

There was a crucial difference, noted in the separate opinion authored by Justice O'Connor, between the Shared Time program later found constitutional and the Community Education program: the fact that in the latter program, the same religious school teachers who taught the students' religious school classes were paid by the government to

conduct ostensibly secular classes. *See id.* at 399-400 (O'Connor, J., concurring in relevant part).

Like the teachers in the Community Education program (and unlike the teachers in the Shared Time program and the program upheld in *Agostini*), the AmeriCorps teachers who receive government funding and sponsorship are the very same teachers who instruct sectarian school students in religion and lead them in prayer. In fact, in this program, both religious and secular teaching take place during the school day, in the same classrooms, and even during the same classroom period. As one AmeriCorps participant testified, religious and secular instruction "are intermixed. It's hard to say I worked from 8:15 to 8:30 talking with a student about God, and then from 8:31 to 8:41 I didn't talk about God at all." (JA 1428)

As the District Court held, under these circumstances "there is a total blurring of religious and non-religious activities." (Pet. App. 49a) This "blurring" is particularly critical because many AmeriCorps participants are teaching young impressionable elementary school students, whose school days are less likely to be divided into regimented, discrete subject matter areas and who are more susceptible to state endorsement of religious beliefs, as this Court has recognized. *See Ball*, 473 U.S. at 390. This danger is heightened even further because the Corporation strongly encourages the teachers here to identify their affiliation with and sponsorship by the government program at issue in their teacher placements.

As the Court described in *Ball*, there are unique constitutional dangers present when government-sponsored teachers are placed in sectarian elementary and secondary schools, where they instruct young children during their formative years. The Court has therefore very closely scrutinized aid programs involving government-supported

teachers under the test first articulated in *Lemon* and refined in the Court's later precedent. *See Lemon*, 403 U.S. at 612; *Agostini*, 521 U.S. at 223-24.

In *Agostini*, for example, the Court only narrowly upheld a program that allowed government-funded *public school* teachers to teach entirely secular subjects on parochial school grounds. *See Agostini*, 521 U.S. at 212. There was no reason to presume, the Court held, that those public school teachers (who were not necessarily even adherents of the schools' religious denomination) would engage in religious indoctrination that might be attributable to the government. *Id.* at 226. However, the Court has never gone so far as to permit the government to subsidize the salaries of *sectarian* school teachers who actually engage in religious instruction and who share the schools' religious commitments, as is the case in this program. Indeed, the Court has struck down a salary subsidy of sectarian school teachers even when those teachers were restricted by statute from engaging in any religious instruction whatsoever. *Lemon*, 403 U.S. at 608.

Instead of paying heed to the danger that impressionable students would be exposed to government-sponsored religious indoctrination, the Court of Appeals focused exclusively on whether the *teachers* in the program had a "private choice" to engage in secular rather than religious activity. (Pet. App. 6a-8a) (citing, *inter alia*, *Zelman*, 536 U.S. at 639) However, the young elementary and secondary parochial school students who are being indoctrinated in religion are not privy to any such supposed "choice" by their teachers – and have no reason to draw any conclusion other than government approval and sponsorship of their teachers' religious message. While the Court of Appeals appears to have justified its disregard of the students' perception by concluding that an "objective observer" would understand that the government was not

sponsoring religious instruction (Pet. App. 7a-8a), even such an objective observer must take into account the context in which the religious message is delivered and the likely effect that the message would have on its intended audience. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (concluding that "[i]n this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration").

II. The Court Should Grant The Petition To Clarify Whether Government Grant Programs Involving Highly Discretionary Criteria Can Be Considered Programs Of "Private Choice"

The Court of Appeals gave no weight to the role of the government's discretion in selecting the programs that recruit, train and place AmeriCorps participants as teachers, stating, "[w]hy, as a matter of constitutional law, this [degree of discretion] ought to be significant is not clear." (Pet. App. 8a) The Court should grant the Petition to provide guidance as to whether government discretion in awarding grants must be considered in deciding whether a program is one of "private choice."

A. The Court Of Appeals' Decision Is Contrary To Authority From Other Federal Circuits

The Court of Appeals' failure to consider the role of government discretion in this case is at odds with the conclusion of at least one other federal Court of Appeals. In *Stark v. St. Cloud State University*, 802 F.2d 1046, 1051 (8th Cir. 1986), the court held that the placement of student-teachers in parochial schools "cannot be seen as a purely private choice of the student[-teachers]" because "[t]he

University initially selects the parochial school as a suitable student teaching site, and exercises the power of final approval over every student placement." More recently, the Court of Appeals for the First Circuit has questioned whether a program can be characterized as one of "private choice" when government discretion – rather than objective criteria – determines how the aid is distributed. *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 349 & n.1 (1st Cir. 2004) ("Maine's scheme provides for the approval of applications based on an individualized assessment of educational benefit, whereas the Cleveland program [at issue in *Zelman*] employed only objective criteria of financial need and residency.") (citation omitted). The Court should accordingly grant the Petition to resolve the split of authority among appellate courts resulting from the Court of Appeals' decision.

B. The Court Of Appeals' Decision Conflicts With This Court's Precedent

Consistent with the First Circuit's observation in *Eulitt* and contrary to the Court of Appeals' decision in this case, this Court's precedents concerning "private choice" have always involved situations in which the aid program was essentially based on the implementation of fixed, mechanical criteria – rather than unbridled government discretion. Thus, for example, in *Zelman*, the Court stated "[a]ny private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards." *Zelman*, 536 U.S. at 645 (citation omitted). *See also Locke v. Davey*, 540 U.S. 712, 715-18 (2004); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 10 (1993); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *Mueller v. Allen*, 463 U.S. 388, 398 (1983).

Even the plurality opinion in *Mitchell* (which would have upheld the per capita payments at issue in that case as resulting from "private choice") did not go so far as to suggest that government aid to religion would be insulated from challenge if the government could pick and choose among potential beneficiaries of the government aid:

> [I]f numerous private choices, *rather than the single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment. Private choice also helps guarantee neutrality by mitigating the preference for pre-existing recipients that is arguably inherent in any governmental aid program, *and that could lead to a program inadvertently favoring one religion or favoring religious private schools in general over nonreligious ones.*

Mitchell v. Helms, 530 U.S. 793, 810 (2000) (plurality) (emphasis added, citations omitted). *See also id.* at 809-10 ("[I]f the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, *to all who adequately further that purpose*, then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose.") (emphasis added, citations omitted). In contrast, if the aid is channeled through only those select groups that the government chooses to fund, one cannot make such an assumption.

Nevertheless, the Court of Appeals erroneously placed the burden on AJC to show the government was intentionally discriminating in favor of religious groups. (Pet. App. 9a) That is a burden that is unprecedented in

Establishment Clause jurisprudence.[4] Even when neutral criteria are used to select beneficiaries, the Court has still been concerned about whether the beneficiaries are using government funds to indoctrinate religion. *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (remanding the as-applied challenge for further proceedings to determine whether the religious grantees were "us[ing] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith"). Had the neutrality of the grant criteria in *Bowen* been sufficient to immunize that program from challenge, the Court would not need to have remanded the case.

The proper Constitutional inquiry is thus not, as the Court of Appeals framed it, whether the government is purposefully favoring religion, but whether religious indoctrination is "reasonably attributable" to government action. *See Mitchell*, 530 U.S. at 809 (plurality). The degree of discretion that the government has in fashioning the slate of options among which aid recipients must choose is highly relevant to whether the aid to religion is traceable to government action.

The relevance of the government's discretion to the constitutional inquiry is illustrated by the facts in this case. Education Awards are only dispensed through participation in government-selected intermediaries – the Corporation's grantees. The Corporation selects these grantees through a subjective and discretionary grant process and then charges them with the responsibility to recruit and place AmeriCorps

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[4] As a practical matter, it would be difficult if not impossible for a party to establish such intentional discrimination. For example, the government would likely argue that agencies' "predecisional" documents explaining why particular grantees were rejected are immune from disclosure under the Freedom of Information Act. *See Nat'l Labor Rel. Bd. v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-52 (1975).

participants in service positions. According to publicly available sources of which judicial notice can be taken, all of the six "faith-based" grantees in the AmeriCorps Education Awards program selected by the Corporation for fiscal year 2004 identify themselves with Christian (and mostly Catholic) faiths. (JA1663, Addendum to Appellate Br. of *Amicus Curiae* in Support of Affirmance)

The government should not be permitted to select religious groups to recruit and place AmeriCorps participants as sectarian school teachers through discretionary grants and then claim to bear no responsibility for the activities of the AmeriCorps participants who serve with the organizations. *See Santa Fe*, 530 U.S. at 307, n.21 ("[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.") (quotation omitted). The Court should grant the Petition to decide whether such a program involving discretionary grants can qualify as a program of "private choice."

III. The Court Should Grant The Petition To Ensure That Direct Cash Grants To Religious Groups Are Restricted For Secular Uses As Mandated By Established Precedent

By holding that the government could fund religious groups with cash payments based only on the government's assumption that the secular costs of administering the program would exhaust the funding, the Court of Appeals' decision conflicts with this Court's established precedent governing direct aid furnished to religious groups. The Court should grant the Petition and make clear that the Court of Appeals' novel and expansive approach to assessing the constitutionality of direct funding of religion is improper.

Special dangers arise when the government provides monetary grants directly to religious groups or institutions. *See Mitchell*, 530 U.S. at 818-19 (plurality), 855 (O'Connor, J., concurring), 890 (dissent). To avoid these dangers, the Court has repeatedly held that direct government aid to religious institutions or programs must be used exclusively for secular purposes.[5] In order to ensure that this restriction is honored, the Court has further required the government to monitor the aid to prevent its diversion to religious uses.[6]

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[5] *Mitchell*, 530 U.S. at 862 (O'Connor, J., concurring in the judgment) (upholding program where government-funded secular instructional materials and equipment are required "only [to] be used for secular, neutral and nonideological purposes") (quotations omitted); *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 751 (1976) ("Like the textbooks and bus transportation in *Allen* and *Everson*, but unlike the teachers' services in Lemon I, physical facilities were capable of being restricted to secular purposes.") (plurality); *Hunt v. McNair*, 413 U.S. 734, 736 (1973) (upholding funding of religious college facilities pursuant to a restriction providing that a funded project may not include "any facility used or to be used for sectarian instruction ....") (quotations omitted).

[6] *Agostini*, 521 U.S. at 212 (program narrowly upheld due to appropriate "safeguards" where "a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month"); *Mitchell*, 530 U.S. at 862 (explaining that the Jefferson Parish Public School System conducted "annual monitoring visits to each of the nonpublic schools receiving Chapter 2 aid") (O'Connor, J. op.); *Bowen*, 487 U.S. at 615 ("Unlike some other grant programs, in which aid might be given out in one-time grants without ongoing supervision by the Government, the programs established under the authority of the AFLA can be monitored to determine whether the funds are, in effect, being used by the grantees in such a way as to advance religion."); *Roemer*, 426 U.S. at 759 (plurality) (agreeing that constitutional requirements were satisfied "by the statutory prohibition against sectarian use [of government funds], *and* by the administrative enforcement of that prohibition ....") (emphasis added); *Nyquist*, 413 U.S. at 780 ("In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear ... that direct aid in whatever form is invalid.").

The Court of Appeals abandoned these established safeguards, instead approving of the government's purely statistical justification for its funding of religion. Rather than ensuring that the government funds are used to fund separable and strictly secular aspects of the program, the Court of Appeals allowed the funding because the government expected that the grantees' secular costs would exceed the amount of the grants. Commentators have expressed concern that the Court of Appeals may thus have endorsed a dangerously broad principle, one that they term a rule of "proportional financing":

> The third, and most radical possibility is that the appellate court has implicitly endorsed a rule of proportional financing, in which public aid to religious entities does not violate the Establishment Clause as long as the government funds no more than the secular portion of the funded activity – even if the activity includes specifically religious content or practices .... [T]he proportional allocation standard poses a significant and ineradicable risk that government funds may be diverted to religious uses.

Ira C. Lupu & Robert W. Tuttle, Legal Analysis, posted on The Roundtable on Religion & Social Welfare Policy, available at http://www. Religionandsocialpolicy.org/legal/legal_update.cfm?id=34.

A comparison with the Court's decision in *Bowen* shows how far such a proportional financing rule would extend the limits of government funding of religion beyond the Court's established boundaries. *Bowen*, 487 U.S. at 621. Under the rule that the Court of Appeals appears to have embraced in this case, the religious groups that received government aid in *Bowen* could have sought to convert individuals that they were counseling to their religious

beliefs and could have spent the grant funds for religious pamphlets to aid in such proselytization. In order to sustain the government grants, the groups would only have to show that the amount of the federal funding was less than the secular costs that those groups incurred. Yet the Court remanded in *Bowen* for consideration of whether the groups in question used the government funds for religious activities, such as inculcating religious doctrine – not whether they engaged in a sufficient amount of secular activity to exhaust the government grants. *Id.* at 621 ("The District Court should also consider on remand whether in particular cases AFLA aid has been used to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'") (citing *Hunt*, 413 U.S. at 743). *See also Nyquist*, 413 U.S. at 779 n.36 ("In *Tilton* [*v. Richardson*, 403 U.S. 672 (1971)], ... the Court was concerned lest any federally financed facility be used for religious purposes at any time. It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities.").

The mode of analysis adopted by the Court of Appeals also cannot be reconciled with this Court's decision in *Regan. Comm. for Pub. Educ. & Rel. Liberty v. Regan*, 444 U.S. 646 (1980). *Regan* did not involve a discretionary program of state *aid* to religious institutions – it involved reimbursement of state-mandated testing. *Regan*, 444 U.S. at 650-51. Reimbursement of the expenses imposed on all private schools by the state left the religious schools in the same position that they would be in absent any government testing requirement. Here, in contrast, the government funding is provided to select religious groups that are chosen as the recipients of government largess.

Moreover, in *Regan*, there were extensive reporting and auditing requirements. *See id.* at 659 ("Of course, under the relevant cases the outcome would likely be different were

there no effective means for insuring that the cash reimbursements would cover only secular services."). In contrast, here the government program included no mechanism to ensure that the government accurately concluded that the amount of the aid was less than the secular administrative costs of the program.

Nevertheless, rather than finding fault with the government's payment of cash funding to religious groups without any accounting or monitoring mechanism in place, the Court of Appeals improperly placed the burden of proof on AJC to show that the amount of the aid in fact exceeded the secular administrative costs of maintaining the program. (Pet. App. 12a) ("AJC marshaled no evidence to show otherwise nor did it make any allegation to this effect.") There is no support in this Court's precedent for imposing such a burden. The Court should grant the Petition to make clear that its established precedent, and not the Court of Appeals' novel rules, governs the analysis of whether direct funding of religious institutions is constitutional.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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Dated: August 30, 2005

APPENDIX

Appendix A

APPENDICES

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED MARCH 8, 2005

United States Court of Appeals,
District of Columbia Circuit.

AMERICAN JEWISH CONGRESS, Appellee
v.
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Appellant
UNIVERSITY OF NOTRE DAME, Appellant
No. 04-5317, 02cv01948.

Argued Jan. 14, 2005.
Decided March 8, 2005.

Before: EDWARDS, HENDERSON, and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

RANDOLPH, Circuit Judge.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion." Laws intended to advance or inhibit religion, or having either effect, violate the Establishment Clause. *Agostini v. Felton,* 521 U.S. 203, 222-23, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). The issue in this appeal from an order granting summary judgment in favor of the American Jewish

Appendix A

Congress ("AJC") is whether portions of the AmeriCorps Education Awards Program, a nationwide community service program operated by the Corporation for National and Community Service, have the effect of advancing religion.

The Corporation funds programs designed to "expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training." 42 U.S.C. § 12501(b)(3). No financial assistance from the Corporation may be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a). Those running an approved program may not discriminate on the basis of religion in selecting program participants. 42 U.S.C. § § 12634(a), 12635(c)(1).

The Corporation created the AmeriCorps Education Awards Program "to expand opportunities for individuals to serve as AmeriCorps Members and earn educational benefits, broaden the network of national service programs and strategies, and increase the number of communities joining with AmeriCorps to better meet their education, public safety, environmental, and other human needs." 61 Fed. Reg. 46,628 (Sept. 4, 1996). An organization (such as a local government or a non-profit organization) proposing to sponsor a national service program must send an application to the Corporation. Proposed service programs must "address unmet human, educational, environmental, or public safety needs and produce a direct benefit for the community in which the projects are performed." 42 U.S.C. § 12582(b)(4). If the Corporation approves the application, the sponsoring organization may recruit individuals to fill its approved national service positions.

Appendix A

Individuals wishing to receive an Education Award perform community service in a program sponsored by an organization approved by the Corporation. The Corporation offers $4,725 in financial aid to those individuals if they complete at least 1700 hours of service in an approved position. The individuals may use the award for education-related expenses, such as graduate school tuition and the repayment of student loans. 42 U.S.C. § 12604(a).

This case involves only individuals who fulfill their service requirement as teachers in religious schools. The University of Notre Dame, a party to this case, sponsors an approved AmeriCorps program that trains individual AmeriCorps participants and places them in needy Catholic schools, where they teach a variety of subjects, including science, mathematics, foreign languages, English, and religion. Brief of Appellant Notre Dame at 2. AJC thinks that the AmeriCorps Education Awards Program violates the Establishment Clause because individuals, such as those at Notre Dame, who are fulfilling their service requirement by teaching secular subjects in religious schools, also may teach religion courses.

AJC objects to another aspect of the AmeriCorps Education Awards Program. In addition to providing training to individual participants, organizations incur a variety of other responsibilities in sponsoring an AmeriCorps national service program. To help defray the expense of training participants and other administrative costs, the Corporation provides grants in the amount of $400 per AmeriCorps participant to all organizations that sponsor participants – religious and non-religious alike. AJC believes the $400 grants to religiously-affiliated

organizations violate the Establishment Clause.

The district court granted AJC's motion for summary judgment and denied the cross motions of the Corporation and Notre Dame. *Am. Jewish Cong. v. Corp. for Nat'l & Community Serv.*, 323 F.Supp.2d 44 (D.D.C. 2004) ("*AJC*"). The court found that the practice of permitting individual participants to teach religion in addition to secular subjects and the $400 cash grants to sponsoring organizations result "in impermissible government indoctrination in violation of the establishment clause of the First Amendment." *Id.* at 45-46. Concluding that prevailing Establishment Clause precedent permits both portions of the AmeriCorps program, we reverse.

I.

While claiming to have standing to bring this suit because of its status as a taxpayer, Brief of Appellee at 62, AJC describes itself as "a non-profit organization," *id.* at iii, which makes one wonder whether it pays any federal taxes. No matter. Even if it does not, it is fair to assume that AJC's members do. *Meek v. Pittenger*, 421 U.S. 349, 356 n. 5, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975). Notre Dame questions AJC's standing, not on this basis, but on the ground that it has not brought itself within the exception to the general rule that taxpayers do not have standing to challenge the manner in which the government spends its tax revenue. *Frothingham v. Mellon*, 262 U.S. 447, 486-87, 43 S.Ct. 597, 67 L.Ed. 1078 (1923). The exception is for taxpayer suits claiming that Congress exercised its Article I, § 8, taxing and spending power in violation of the Establishment Clause. *Flast v. Cohen*, 392 U.S. 83, 102, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

Appendix A

Whatever doubt there might have been before *Bowen v. Kendrick,* 487 U.S. 589, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988), it is now clear that the exception includes more than just taxpayer suits, based on the Establishment Clause, attacking taxing-and-spending statutes on their face. Also within the exception are taxpayer actions claiming a violation of that constitutional provision because of the manner in which the Executive Branch is administering the statute. *Id.* at 618-20, 108 S.Ct. 2562. A "claim that funds appropriated by Congress are being used improperly by individual grantees" is no less "a challenge to congressional taxing and spending power simply because the funding authorized by Congress has flowed through and been administered by" an executive official. *Id.* at 619, 108 S.Ct. 2562.

Notre Dame thinks this case is distinguishable from *Bowen* because AJC alleged that some, but not all, of the Corporation's actions violated not only the Establishment Clause, but also the National Community Service Act and the regulations thereunder. *See In re United States Catholic Conference,* 885 F.2d 1020 (2d Cir.1989). The distinction cannot be sustained. Despite a suggestion in its complaint, AJC has made clear that it relies solely on the Establishment Clause. Brief of Appellee at 63. No argument it has made to us rests on a statutory violation; all are aimed at the constitutionality of the Corporation's administration of the AmeriCorps program and the manner in which it allocates funds. Those arguments persuaded the district court and framed its decision. As the case now stands, it therefore fits comfortably within the rationale of *Bowen:* "The [National Community Service Act] is at heart a program of disbursement of funds pursuant to Congress' taxing and spending power, and [AJC] calls into question how the funds

authorized by Congress are being disbursed pursuant to the [Act's] statutory mandate." 487 U.S. at 619-20, 108 S.Ct. 2562. It follows that there is "a sufficient nexus between the taxpayer's standing as a taxpayer and the congressional exercise of taxing and spending power, notwithstanding the role the [Corporation] plays in administering the statute." *Id.* at 620, 108 S.Ct. 2562.

II.

AJC's principal complaint is that individuals, while teaching secular subjects at religious schools under the AmeriCorps program and receiving credit toward an Educational Award, may also teach religious subjects. *See* Compl. ¶ ¶ 4, 63-66. Under *School District of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985), according to AJC, if an AmeriCorps participant decides to teach religion, the decision is attributable to the government. *Ball* struck down two school district programs – a "Shared Time" program and a "Community Education" program. AJC focuses on the "Community Education" program in which the school district hired religious school teachers to teach secular classes in after-school programs in religious schools. The Supreme Court held that this program violated the Establishment Clause because it created a "symbolic union" between government and religion; "the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school' classes, even if the latter were successfully kept free of religious indoctrination." *Id.* at 391-92, 105 S.Ct. 3216.

Much of the reasoning in *Ball* has been overturned. *See Agostini v. Felton*, 521 U.S. 203, 236, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). We believe the Supreme Court's more recent decisions upholding programs of true private

choice, particularly *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002), control this case. *See also Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993); *Witters v. Washington Dep't of Servs. for Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986); *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983). When a government program is neutral toward religion and "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the Establishment Clause is not violated. *Zelman*, 536 U.S. at 652, 122 S.Ct. 2460. In that situation, no "objective observer familiar with the full history and context" of the program would believe that the aid flowing to the religious institution carries with it "the *imprimatur* of government endorsement." *Id.* at 655, 122 S.Ct. 2460.

The AmeriCorps participants and the grantees are, and must be, chosen without regard to religion. The Education Awards are available to a broad class of citizens. Any citizen at least 17 years old who holds a high school diploma or its equivalent and is selected to fill a national service position may qualify. 42 U.S.C. § 12591. Individual participants who elect to teach religion in addition to secular subjects do so only as a result of "their own genuine and independent private choice." The AmeriCorps program creates no incentives for participants to teach religion; they may count only the time they spend engaged in non-religious activities toward their service hours requirement. And if they do teach religious subjects, they are prohibited from wearing the AmeriCorps logo when they are doing so. In this situation, no reasonable person, "knowing all the circumstances," *Sao Paulo State of*

Federative Republic of Brazil v. Am. Tobacco Co., 535 U.S. 229, 232, 122 S.Ct. 1290, 152 L.Ed.2d 346 (2002), would believe that a participant's choice to teach a religion course had – in *Zelman*'s words – "the *imprimatur* of government endorsement." 536 U.S. at 655, 122 S.Ct. 2460.

AJC sees two reasons why the AmeriCorps program should not be considered a program of private choice. The first is that the AmeriCorps program is not neutral. The district court agreed, in part because an Internet search had revealed that three grantees were requiring AmeriCorps participants to "be of a particular faith." *AJC*, 323 F.Supp.2d at 60. These grantees were violating the governing statute and regulations, 42 U.S.C. § 12635(c); 45 C.F.R. § 2540.210; the Corporation took corrective action when it discovered their postings; and before the district court rendered its decision, they had lifted the restriction. *AJC*, 323 F.Supp.2d at 58 n. 8; Brief of Appellant National Corporation at 35.

The district court also thought neutrality was missing because the Corporation uses "highly discretionary criteria" to choose AmeriCorps grantees. *AJC*, 323 F.Supp.2d at 60. AJC strikes much the same note. Why, as a matter of constitutional law, this ought to be significant is not clear. The Supreme Court has not treated discretionary distribution of government funds as lacking in neutrality. In the program upheld in *Bowen v. Kendrick* – the Adolescent Family Life Act – the Secretary of Health and Human Services awarded grants based, in part, on what can only be viewed as subjective determinations. *See* 42 U.S.C. § § 300z-1(3), 300z-2(a) (1982); *see also Bowen*, 487 U.S. at 597, 108 S.Ct. 2562 (noting that the Secretary awarded 141 grants from a pool of more than 1000 applications). We are aware

of nothing in the law requiring that government aid, to pass muster under the Establishment Clause, must be handed out according to objective criteria only. All the law requires is that the government distribute funds in a manner that is neutral with respect to religion. *See Zelman,* 536 U.S. at 652, 122 S.Ct. 2460; *Agostini,* 521 U.S. at 230-31, 117 S.Ct. 1997. Perhaps discretionary criteria, in some circumstances, might serve as a pretext for the government to "grant special favors that might lead to a religious establishment." *Mitchell v. Helms,* 530 U.S. 793, 810, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (plurality). But AJC did not allege that the Corporation had used its discretionary authority to favor religious organizations, and it conceded at oral argument that there was no evidentiary support for such an allegation. We conclude, therefore, that the program is neutral.

AJC's other argument is that a participant's decision to perform his national service obligation in a religious school is not "a genuine and independent private choice." *Zelman,* 536 U.S. at 652, 122 S.Ct. 2460. "Eligibility for an AmeriCorps award is established," AJC argues, "only through participation in a limited number of the government's hand-picked, pre-selected programs." Brief of Appellee at 50. The relevant question is whether participants seeking to earn an Educational Award possess a genuine independent choice between religious and non-religious organizations in which to perform their national service. Of course the number of such opportunities is, as AJC puts it, "limited." It could hardly be unlimited. The important points are (1) that there are numerous AmeriCorps teaching positions in public and private secular schools; and (2) that there is no evidence of any participant who wanted to teach in a secular school, but was impermissibly channeled to a religious school. A program may be one of "true private

choice" even when more religious than non-religious choices are available. In *Zelman*, 82 percent of the eligible private schools participating in the voucher program were religious schools and 96 percent of the students who took advantage of vouchers attended religious schools. 536 U.S. at 655-58, 122 S.Ct. 2460. Here, only 328 of the 1608 schools employing AmeriCorps participants as teachers in 2001 were religious schools. When enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice.

AJC also faulted the Corporation for failing to police its prohibition against a participant's counting time spent teaching religion courses toward the service hours requirement. In *Mitchell v. Helms*, four Justices concluded that neutrality is the touchstone of Establishment Clause inquiries in government aid cases, and that when eligibility for aid is determined neutrally, "any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." 530 U.S. at 820, 120 S.Ct. 2530. The two concurring Justices in *Mitchell* concluded that *de minimis* diversion of aid tends to show that a program's safeguards are, in fact, working. *Id.* at 865-66, 120 S.Ct. 2530 (O'Connor, J., concurring in judgment). In the district court, AJC presented evidence suggesting that, since 1999, four AmeriCorps participants may have counted time spent teaching religion toward their service hour requirement. *See* AJC Statement of Undisputed Facts ¶ ¶ 92-126. The Corporation disputed the evidence. *AJC*, 323 F.Supp.2d at 55. Even if we credited AJC's version, it proves nothing of significance. During the same period, one sponsoring organization alone – the Catholic Network of Volunteer Service – placed 492 AmeriCorps participants as

teachers in religious schools. AJC Statement of Undisputed Facts ¶ 80. AJC therefore failed to substantiate its claim that the present monitoring of participants' timekeeping is so ineffective, and the violations so pervasive, that the AmeriCorps program must be seen as one in which the government is giving participants Education Awards for hours they spend teaching religion.

III.

This leaves the question of the $400 program management grants to organizations operating service programs. The $400 grants reimburse grantees for a portion of the costs they incur when complying with various AmeriCorps requirements. The Supreme Court upheld a similar system in *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 657-58, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980), and rejected the idea that the Establishment Clause required it to invalidate "reimbursements simply because they involve payments in cash." The program in *Regan* provided "direct cash reimbursement" to religious and secular nonpublic schools for performing various testing and reporting services mandated by state law. *Id.* at 657, 100 S.Ct. 840. Here, detailed AmeriCorps guidelines require, among other things, that grantees train participants, provide them with adequate supervision by qualified supervisors, keep various records, and make regular reports to the Corporation. The $400 is meant to defray some of the costs.

AJC focuses on the lack of auditing or accounting of the AmeriCorps grants. Brief of Appellee at 58-59. The program in *Regan* included extensive auditing to verify that the schools did not receive public funds in excess of the expenditures incurred as part of the testing. 444 U.S. at 650

n. 3, 659-60, 100 S.Ct. 840. Here audits would be senseless. The evidence showed that $400 is much less than the actual administrative costs grantees incur per participant. In Notre Dame's program, for instance, the $400 grants cover only about eight percent of the salaries of those who train the AmeriCorps participants to teach in elementary schools. AJC marshaled no evidence to show otherwise nor did it make any allegation to this effect.

Regan therefore controls this aspect of the case. The government does not promote religion in violation of the Establishment Clause when it reimburses all grantees, religious and secular alike, for a portion of the costs they incur in complying with the requirements of the AmeriCorps program.

* * * * * *

For the reasons stated, the district court's judgment is

Reversed.

Appendix B

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED JULY 2, 2004

United States District Court,
District of Columbia.
AMERICAN JEWISH CONGRESS, Plaintiff,
v.
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Defendant,
University of Notre Dame, Defendant-Intervenor.
No. CIV.A. 02-1948(GK).

July 2, 2004.

MEMORANDUM OPINION

Kessler, District Judge.

Plaintiff, the American Jewish Congress, brings this action against the Corporation for National and Community Service ("Corporation"). The University of Notre Dame ("Notre Dame") is a Defendant-Intervenor. This matter is now before the Court on three Motions for Summary Judgment filed by Plaintiff, the Corporation, and Notre Dame. Upon consideration of the Motions, Oppositions, Replies, the June 2, 2004 Motions Hearing, and the entire record herein, and for the reasons set forth below, Plaintiff's Motion is **granted**, the Corporation's Motion is **denied**, and Notre Dame's Motion is **denied**.

It is clear from the record in the instant case that the

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AmeriCorps Education Awards Program ("EAP") being challenged by Plaintiff results in impermissible government indoctrination in violation of the establishment clause of the First Amendment.

First, it is undisputed that the AmeriCorps EAP offers program participants a national service education award of $4,725 to work in religious schools where they teach religion to their students throughout the school day, lead their students in prayer multiple times a day, and attend Mass with their students.

The Corporation defends this practice by arguing that the religious instruction undertaken by AmeriCorps participants during the school day is separate from their AmeriCorps service because the time they spend engaging in religious activity is not recorded on the timesheets they submit to justify their $4,725 award. In particular, the Corporation claims that its timekeeping policies ensure that the AmeriCorps participants do not receive public funding for the time they spend in religious activity.

However, the record discloses that the Corporation's monitoring efforts are totally inadequate to ensure that its timekeeping policies are followed. Moreover, even if the Court assumes that the Corporation accurately estimates the time AmeriCorps participants spend on religious versus non-religious activities, it is impossible to clearly distinguish between the two roles the AmeriCorps participants supposedly play. The line between the two has become completely blurred.

Second, it is undisputed that the Corporation does not require faith-based AmeriCorps EAP grantees to account for

the actual use of the $400 grants paid for every full-time participant. The Corporation claims that the secular administrative costs of the AmeriCorps EAP are "expected" to exceed the amount of the grant. However, the Corporation's "expectation" that the grantees will spend the direct monetary grants on secular administrative costs – without actually requiring any segregation or accounting for the use of the grants – is not sufficient to render the grants constitutional.

For these reasons, the Court concludes that such direct government involvement with religion "crosses the vague but palpable line between permissible and impermissible government action under the First Amendment." *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 416 (2d Cir. 2001).

I. Background[1]

A. The Corporation and Its AmeriCorps Education Awards Program

The Corporation administers the National and Community Service Act ("Act"), 42 U.S.C. § 12501, *et seq.* *See* 42 U.S.C. § 12651. The purpose of the Act is to "meet the unmet human, educational, environmental, and public safety needs of the United States." *Id.*, § 12501(b)(1). The Corporation's "mission" "is to engage Americans of all ages and backgrounds in community-based service" by, among other things, "provid[ing] educational opportunity for those who make a substantial commitment to service." 45 C.F.R.

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[1] Unless otherwise indicated, all facts set forth herein are taken from the undisputed facts presented in the parties' briefs.

§ 2510.10. Corporation funds may not be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a).

The Corporation funds a wide variety of programs in furtherance of its mission. These programs are designed to "expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training...." 42 U.S.C. § 12501(b)(3). One such program is the AmeriCorps EAP. In order to "attract participants and encourage service," Def.'s Statement of Facts, ¶ 2, the Corporation offers AmeriCorps EAP participants a full-time national service education award for completing a term of at least 1700 hours of service during a nine- to twelve-month period, in a national service position pre-approved by the Corporation.[2] *See* 42 U.S.C. § § 12593(b)(1), 12602(a)(1), (b).

The AmeriCorps EAP, like most of the Corporation's programs, is administered through grantees such as state and local governments, Indian tribes, and non-profit organizations, including both secular and faith-based organizations. *See* 42 U.S.C. § § 12592(a), 12653. The Corporation has offered two pieces of evidence to describe the process it uses to evaluate grantee applications. This evidence presents two very different pictures of what factors the Corporation relies on in making grantee decisions.

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[2] The current amount of the education award is $4,725. *See* 45 C.F.R. § 2527.10(a). The education award may be used to pay principal or interest on a student loan, to pay college expenses, or to pay expenses of an approved school-to-work program. *See* 42 U.S.C. § 12604(a). The Corporation also pays interest that accrues on a participant's qualifying student loans during his or her term of service. *See* 45 C.F.R. § 2529.10.

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According to Hank Oltmann, the Corporation's Senior Program Officer and the Director of the AmeriCorps EAP, the Corporation assesses, among other things, "the extent to which the applicant identifies a compelling need and describes how that need was identified." Oltmann Decl., ¶ 15. To satisfy this requirement, applicants "include data such as position vacancy rates among social service providers, measures of academic underachievement, crime rates, health indicators, and socioeconomic indicators such as regional unemployment rates or the percentage of students qualifying for subsidized school lunches." *Id.* Oltmann also explains that "[o]ne of the Corporation's primary criteria in considering applications is 'Budget/Cost Effectiveness.' Each application must describe how the proposed program will be funded, including the use of non-federal sources to support program design." *Id.*, at ¶ 17.

The 2004 AmeriCorps Guidelines, which are far more specific and rigid, include a section titled "Review Process and Selection Criteria."[3] *See* Second Oltmann Decl., Ex. B, at 41. According to the 2004 Guidelines, "Program Design" constitutes 60 percent of the selection criteria; "Organizational Capacity" ("[a]bility to provide sound programmatic and fiscal oversight;" "[s]ound track record of accomplishment as an organization;" "[w]ell-defined roles for staff and administrators;" and "[w]ell-designed plan or systems for self-assessment, evaluation, and continuous improvement") constitutes 25 percent; and "Budget/Cost Effectiveness" ("[c]ommitment of applicant organization or host agency to securing resources, i.e., non-federal support

[3] Each year, the Corporation disseminates AmeriCorps Guidelines to all grantees.

for program implementation or sustainability;" "[a]dequate budget to support program design;" and "[c]ost-effective within program guidelines") constitutes 15 percent. *Id.*, at 41-42.

"Program Design" includes 3 categories: (1) "Needs and Service Activities" ("[w]ell-documented compelling community need;" "[w]ell-designed activities with appropriate performance measures;" "[w]ell-defined roles for participants that lead to measurable outcomes or impact;" "[p]revious history of accomplishments in the proposed activity areas;" "[e]ffective involvement of target community in planning and implementation;" and "[a]bility to provide or secure effective technical assistance"), *id.*, at 41; (2) "Member Development" ("[e]ffective plans for recruiting, developing, training, supervising, and recognizing participants;" "[w]ell-designed activities that promote an ethic of service and civic responsibility;" and "[w]ell-designed plan to engage participants in high-quality service learning as defined by the Corporation"), *id.*; and (3) "Strengthening Communities" ("[d]eveloping community resources, including recruiting and managing volunteers, with appropriate performance measures;" and "[s]trong community partnerships, including well-defined roles for faith- or community-based organizations;" "[p]otential for sustainability;" "[e]nhanced capacity building of organizations and institutions;" and "[b]ring together people of different backgrounds"). *Id.*

In fiscal years 1999, 2000, and 2001, the Corporation received a total of 153 grant applications, of which 134 were approved. Def.'s Statement of Facts, ¶ 18. In fiscal year 2002, the Corporation received 29 grant applications, of

which 20 were approved.[4] *Id.*, ¶ 19. Thus far in fiscal year 2004, there are 34 AmeriCorps EAP grantees. *See* Fifth Olmann Decl., ¶ 3.

Grantees are responsible for recruiting and selecting AmeriCorps EAP participants for their individual programs. *See* Second Oltmann Decl., Ex. B, at 16. *See also* 45 C.F.R. 2522.210. The Corporation has developed and implemented an on-line recruitment system to assist the grantees with this process. *See* Second Oltmann Decl., Ex. B, at 16. This on-line system includes a description of the Corporation's various programs and a list/description of the grantees in each of those programs. It also includes a search engine that allows prospective participants to locate programs based on the service area they are interested in (education, health, homelessness, etc.), geographic location, work schedule, and program type (AmeriCorps*VISTA, EAP, etc.). The Corporation also makes the same information available by telephone. *See* Oltmann Decl., ¶ 6.

At oral argument, the Corporation stressed that an AmeriCorps participant may earn an education award without participating in a grantee program that it has pre-approved. While the Corporation cites to 42 U.S.C. § 12573[5] in support of this claim, that section does not

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[4] Two grantee applicants withdrew their application prior to decision. Def.'s Statement of Facts, ¶ 19.

[5] 42 U.S.C. § 12573 states, in full,

> The Corporation may approve of any of the following service positions as an *approved* national service position that includes the national service educational award

appear to allow participation in any but pre-approved programs. In any case, it is clear from the Corporation's representations at oral argument that, regardless of what the statute permits, an AmeriCorps participant must, as a matter of Corporation policy, serve in a grantee program that the Corporation has pre-approved in order to earn an education award.

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described in division D of this subchapter as one of the benefits to be provided for successful service in the position:

(1) A position for a participant in a national service program described in section 12572(a) of this title that receives assistance under subsection (a) or (b) or section 12571 of this title.

(2) A position for a participant in a program that-

(A) is carried out by a State, a subdivision of a State, an Indian tribe, a public or private nonprofit organization, an institution of higher education, or a Federal agency; and

(B) would be eligible to receive assistance under section 12571(a) of this title, based on criteria established by the Corporation, but has not applied for such assistance.

(3) A position involving service as a VISTA volunteer under title I of the Domestic Volunteer Service Act of 1973 (42 U.S.C. 4951 *et seq.*).

(4) A position facilitating service-learning in a program described in section 12572(a)(3) of this title that is eligible for assistance under part I of division B of this subchapter.

(5) A position for a participant in the Civilian Community Corps under division E of this subchapter.

(6) A position involving service as a crew leader in a youth corps program or a similar position supporting a national service program that receives an approved national service position.

(7) Such other national service positions as the Corporation considers to be appropriate.

42 U.S.C. § 12573 (emphasis added).

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The only federal funds disbursed in the AmeriCorps EAP are the post-service education awards of $4,725 offered to the individual AmeriCorps participants and the $400 monetary grant provided directly to AmeriCorps EAP grantees for every full-time AmeriCorps participant that they enroll.

B. Placement of AmeriCorps Participants as Teachers in the Religious Schools of Faith-Based AmeriCorps EAP Grantees

In fiscal year 2001, 565 AmeriCorps participants were placed as teachers in 328 religious schools which were EAP grantees. *Id.*, ¶ ¶ 66-67. The University of Notre Dame (which maintains a program called the Alliance for Catholic Education ("ACE") and the Catholic Network of Volunteer Service ("CNVS")) are among those faith-based AmeriCorps EAP grantees that place the largest number of AmeriCorps participants as teachers in religious schools.[6]

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[6] While Plaintiff named the Nebraska Volunteer Service Commission ("Nebraska Program") as an "AmeriCorps grantee[ ] at issue in this action" in its Complaint, it did not refer to that program in its briefs or at oral argument except to "reserve the right to seek further discovery of other grantees that place religion teachers in sectarian schools, including the Nebraska Teachers Corps, prior to any trial of this matter." Pls.' Opp'n, at 8, n. 10.

According to the Corporation, of the 34 grantees currently in the AmeriCorps EAP, "the following are faith-based organizations that receive grants directly from the Corporation: (1) University of Notre Dame; (2) Catholic Network of Volunteer Service; (3) Mt. Mary College; (4) Camphill Association of North America; (5) University of San Francisco; and (6) L'Arche USA. In addition, one faith-based organization, Brigham Young University, is a subgrantee of the Utah State Commission on Volunteers." Fifth Oltmann Decl., ¶ 3.

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Pursuant to the Corporation's governing regulations concerning prohibited activities, "[w]hile charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation, ... [AmeriCorps participants] may not engage in ... religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, ... or ... any form of religious proselytization." 45 C.F.R. § 2520.30(a)(7).

This regulation also states that "[i]ndividuals may exercise their rights as private citizens and may participate in [prohibited] activities on their own initiative, on non-AmeriCorps time, and using non-Corporation funds. The AmeriCorps logo should not be worn while doing do." *Id.*, § 2520.30(b). The Corporation construes this regulation to permit AmeriCorps participants to teach religion throughout the school day in their placements at religious schools so long as they do not count the hours they spend engaging in such religious activity toward their 1700-hour AmeriCorps minimum service commitment.

The Corporation encourages AmeriCorps participants placed as teachers in religious schools, and the religious schools in which they are placed, to publicize their affiliation with AmeriCorps. Pl.'s Statement of Facts, ¶ ¶ 70, 73. Ms. Kerry Galea, the Corporation's Site Visit Coordinator, testified that sites are "strongly encouraged to identify with AmeriCorps." Galea Decl., ¶ 31. It is the Corporation's "expectation" that its "Education Awards Programs and members take specific action to create an identity that includes AmeriCorps symbols and networks." Pl.'s Ex. A-2, at C 3347.

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The concept of "AmeriCorps Identity," i.e., "the extent to which the provision of AmeriCorps funding is outwardly evident at the site," is one of the specific items that Corporation personnel look for when they conduct site visits at religious schools. Oltmann Decl., ¶ 52. They are also asked to inquire whether the program in question "identif[ies] itself, and ... the members identify themselves, with AmeriCorps, through use of signs, T-shirts, sweatshirts, banners, logos that incorporate the A*C logo." Pl.'s Ex. A-2, at C 3347.

The Corporation requests that "site supervisors" post "an AmeriCorps sign or banner" at the sites where AmeriCorps participants are placed.[7] Specifically, the Corporation requests that sites place these displays "within the vicinity of wherever you[r] member is located, so members of your staff and service community can identify the member's participation in AmeriCorps." Pl.'s Statement of Facts, ¶ ¶ 75-76. The Corporation also enables grantees to purchase clothing and other items bearing the AmeriCorps logo, including signs, T-shirts, buttons, and sweatshirts. *Id.*, ¶ 78. The aggregated budgeted amount for such items in the first four years of CNVS' grant from the Corporation was $180,326.75. *Id.*, ¶ 81.

According to a 2002 Corporation site visit report on a CNVS program, there were AmeriCorps signs in each of the classrooms and at the entrances to the religious schools where AmeriCorps participants were placed. *Id.*, ¶ 86. At another CNVS school, the AmeriCorps participants were

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[7] The typical AmeriCorp sign is a gray, 9" x 12" sign with the letter "A" in the middle. Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 75.

introduced to students and staff as AmeriCorps participants. *Id.*

According to the Corporation, AmeriCorps participants placed as teachers in religious schools are expected to wear the same professional attire as other school personnel. In particular, they are instructed not to wear any AmeriCorps gear, such as a T-shirt or cap, at any time while teaching religion or attending any religious function in a school. Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 90.

1. The University of Notre Dame's Alliance for Catholic Education Program

The Alliance for Catholic Education ("ACE") program is an AmeriCorps EAP operated by the University of Notre Dame, a private Catholic University located in South Bend, Indiana. According to Dr. John J. Staud, ACE's Administrative Director, ACE had 163 participants during the 2002-2003 school year, approximately 50 percent of whom served as teachers in primary and secondary schools and taught religious subjects. Staud Decl., ¶¶ 10, 15.

One of the "pillars" of the ACE Program is "spirituality." The mission of the ACE teachers is ultimately connected with the larger evangelizing mission of the Catholic Church. Pl.'s Statement of Facts, ¶ 37.

The ACE program includes a "summer program" designed to prepare ACE participants for their placements as teachers. During this summer program, ACE offers prayer services – specifically Catholic Mass – four times a week. At the beginning of this summer program, a retreat is held. Prayer experiences, including Masses and morning prayer,

are offered at the retreat. A series of additional retreats are held during the ACE program as part of a "12-step program" designed "[t]o harness and more effectively embody and communicate the key themes related to Christ Teacher." *Id.*, ¶¶ 46-48.

Some of the courses that are taught during the summer program have religious content, and some of these courses are mandatory for ACE AmeriCorps teachers. One such mandatory class, titled the "Integrative Seminar," includes a lecture on "becoming educators in faith, leading others in prayer and forming prayerful communities in Catholic schools." *Id.*, ¶ 51. The Summer 2001 course syllabus for this class included such topics as "To Teach as Jesus Did: The Catholic Educator's Call to be the Love of God on Earth" and "Becoming Educators in Faith: Catechesis in Catholic Schools." *Id.* Another mandatory class is EDU 502, an introduction to teaching. According to the syllabus from one year of that class, "[i]t is absolutely essential that members of ACE have some familiarity with the Catechism of the Catholic Church." *Id.*, ¶ 52.

All ACE teachers live in "intentional Christian communities" of 4 to 7 people which are meant to foster Christian beliefs and values. Members of these communities are invited to pray together. When staff members from ACE conduct site visits to these communities, they look for the extent to which the members engage in communal prayer. *Id.*, ¶ 54-56.

ACE has a series of "new teacher performance indicators" that are applied to measure the performance of the teachers in religious schools after the summer program ends. Among the performance indicators are whether the

ACE teacher "provides a variety of prayer experiences" and "witnesses as a person of faith and prayer." *Id.*, ¶ 44.

The Corporation maintains that ACE AmeriCorps teachers are "well aware that [it] prohibits providing religious instruction, conducting worship services, or engaging in any form of proselytization as part of AmeriCorps service, and that no such activities may be included in the 1700 hours of service needed to receive a full-time AmeriCorps education award." Def.'s Statement of Facts, ¶ 97.

2. The Catholic Network of Volunteer Service

The Catholic Network of Volunteer Service ("CNVS") is a religious organization composed of a "loose network" of about 209 member organizations, of which approximately 80 percent are Catholic. The other 20 percent are groups affiliated with other Christian denominations. Approximately 30 percent of AmeriCorps participants serving as teachers in religious schools through CNVS member organizations teach religious subjects. Pl.'s Statement of Facts, ¶ 60.

CNVS maintains a "Response Directory," located on the world wide web at *http://www.cnvs.org*. It contains a description of volunteer opportunities that are available through CNVS member organizations, and can be searched electronically by category of service activity. A search for placements conducted by Plaintiff on February 17 and March 1, 2004 disclosed the following: (1) The Franciscan Volunteer Ministry indicated that participants are required to be "[d]ependable and flexible Christian men and women." Pl.'s Reply, at 21. Under "Goal of the Program," the

Ministry indicated that it "encourage[s][its] volunteers as lay people to come to full stature in the Catholic Church...." *Id.* (2) The Pacific Alliance for Catholic Education indicated that participants "[m]ust be Catholic." *Id.* (3) Red Cloud Volunteers indicated that participants are required to be "Christian." *Id.* One of the goals of the program is that "[v]olunteers integrate their Christian faith through service to others...."[8] *Id.*

C. The Corporation's Monitoring of AmeriCorps Participants' Timekeeping and Eligibility for AmeriCorps Education Awards

In applying for an AmeriCorps education award, grantees must execute a set of Corporation-prescribed "Assurances and Certifications," by which the grantee certifies that it will, if awarded a grant, comply with certain stated Corporation requirements, including that it "[w]ill comply with all rules regarding prohibited activities ... and will ensure that no assistance made available by the Corporation will be used to support any such prohibited activities." Oltmann Decl., ¶ 36, Ex. D.

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[8] In the Corporation's Opposition to Plaintiff's Statement of Facts, filed on January 29, 2004, the Corporation represented that CNVS was "implementing correcting action" with regard to these organizations. As of June 2, 2004, no changes had been made to the position description posted by Red Cloud Volunteers. As of June 28, 2004, however, the appropriate changes had been made. *See* CNVS Response Directory *at* http:// www.cnvs.org.

At oral argument, the Corporation represented that Red Cloud Volunteers was no longer an AmeriCorps EAP host site. As of June 28, 2004, however, Red Cloud Volunteers was still listed on the CNVS Response Directory as an AmeriCorps EAP host site. *See id.*

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Each grantee also must enter into a written "site agreement" with each of its host sites. *Id.*, ¶ 40. These agreements set forth "roles and responsibilities to ensure that the grant provisions and program requirements are met." *Id.* Additionally, the Corporation requires grantees to provide formal orientation for new AmeriCorps participants, and identifies the elements that must be included in the orientation. *Id.*, ¶ 39.

Each year, the Corporation disseminates AmeriCorps Guidelines to all grantees. The 2004 AmeriCorps Guidelines "emphasize that grantees are responsible for monitoring the service activities of participants and for the timely and accurate documentation and certification of service hours." Def.'s Statement of Facts, ¶ 31.

AmeriCorps participants must record their service hours on timesheets. Since August 2002, the Corporation has required AmeriCorps participants who are placed as teachers in religious schools to document the specific activities for which they are accumulating service hours toward their 1700 minimum service commitment, such as which subjects they are teaching. Pl.'s Statement of Facts, ¶ 128. AmeriCorps participants submit their timesheets to the grantees in whose programs they are serving, such as ACE and CNVS. The grantees enter the AmeriCorps hours from the timesheets into a web-based reporting system maintained by the Corporation.

The timesheets are not provided to or reviewed by the Corporation prior to the granting of the $4,725 education award. The Corporation reviews the timesheets only during site visits or in the event of an audit.

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Upon completing a term of service in the AmeriCorps EAP, each AmeriCorps participant is required to complete an exit form. The first page of the exit form, which is completed by the participant, includes personal information such as his or her name, address, and social security number. It does not include the number of hours of AmeriCorps service he or she has performed. The AmeriCorps participant must sign the first page of the exit form with the understanding that a "knowing and willful false statement on this fo.m can be punished by a fine or imprisonment or both under Section 1001 of Title 18, U.S.C.." *Id.*, ¶ 136. The second page of the exit form, which is completed by the certifying official, provides the number of service hours the participant performed. There is no space for the AmeriCorps participant to sign his or her name to verify the number of hours reported on this page. Neither page of the exit form specifies the particular activities (such as the subject(s) taught) for which the AmeriCorps participant accumulated service hours.

Since October 2001, the Corporation has also required each AmeriCorps participant who performs service hours as a teacher in a religious school to sign an additional "certification" before receiving an education award. Although that certification states that the service hours reported on the exit form do not "include any religious instruction, worship, or proselytization," Oltmann Decl., ¶ 42, Ex. F, it does not require the signer to acknowledge that any "knowing and willful false statement on this form can be punished by a fine or imprisonment or both under Section 1001 of Title 18, U.S.C.." Pl.'s Statement of Facts, ¶ 141. It also does not require that the signature be made under penalty of perjury. *Id.* The supervisor at the host site where the AmeriCorps participant performed his or her service

must also sign the certification; that signature is also not required to be made under oath or penalty of perjury. The Corporation maintains that it has instructed grantees which place AmeriCorps participants as teachers in religious schools not to submit an exit form for any such participants until their certifications have been completed.

Neither the exit form nor the certification is provided to or reviewed by the Corporation prior to the granting of an education award.

The Corporation conducts site visits in an effort to directly monitor grantees and AmeriCorps participants. In 2001, the Corporation conducted a total of 5 or 6 site visits per year to the 328 religious schools in which AmeriCorps participants were serving as teachers. Prior to the fall of 2002, the Corporation had never visited a religious school at which CNVS member organizations placed AmeriCorps participants as teachers. *Id.*, ¶ 152. In 2002, the Corporation visited 10 grantees and 37 host sites. All site visits to grantees are pre-announced. *Id.*, ¶ 156.

Despite the fact that all site visits are pre-announced, site visit reports have still revealed serious infractions of Corporation policy. *Id.*, ¶ 166. Specifically, site visits have found some AmeriCorps participants recording time engaging in religious activity on their timesheets, and others have been confused over which types of activities may be recorded and which may not. Other site visits have found timesheets that were signed months after the work was completed, or not at all. And some site visits have revealed documents in the participants' AmeriCorps files which detailed explicit religious missions or requirements associated with their positions with the schools.

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In addition to site visits, the Corporation has ongoing telephonic, electronic, and paper communications with EAP grantees that include compliance issues. Def.'s Statement of Facts, ¶ 71. The Corporation also assigns a program officer to oversee each grantee and conducts monthly conference calls with grantees to discuss program operations. *Id.*, ¶ ¶ 72, 73.

Plaintiff cites four individual AmeriCorps participants as examples of problems in the administration of the AmeriCorps EAP.

AmeriCorps participants Kelly Stolz and Jennifer B'Oris were placed in religious schools in Boston, Massachusetts during the 2002-2003 school year through the Urban Catholic Teacher Corps, a CNVS member organization. The Urban Catholic Teacher Corps' "Handbook for Community Living" for 2002-2003 stated that "Corps members are expected to attend weekly Mass," and that "[p]rayer and sharing the stories of God's action daily life are the foundation of the Urban Catholic Teacher Corps.... [T]hus, Corps members must establish a regular day and time for weekly prayer and faith sharing." Pl.'s Statement of Facts, at ¶ 93. The mission statement of the school where Ms. Stolz was placed stated that "[t]o Preach the Gospel as Jesus did" is one of the "three-fold aim [s]" of the school. *Id.*, at ¶ 94.

Ms. Stolz testified that she integrated her religious instruction throughout the school day and led her pre-kindergarten students in prayer four times a day. *Id.*, ¶ 97. Ms. B'Oris taught a third-grade class and similarly taught religion, including a 30-minute period of direct religious

instruction; she also led her students in prayer 3 times a day. *Id.*, ¶ 101-02. Both Ms. Stolz and Ms. B'Oris attended Mass with their students. Religious symbols were visible in both teachers' classrooms, including items such as crucifixes, statutes of Mary, and the Hail Mary prayer written on posters. *Id.*, ¶ 99- 103. An AmeriCorps sign was posted in both teachers' classrooms and at the entrance of the schools where they taught. *Id.*, ¶ 100, 104.

AmeriCorps participant Mary-Colleen Duggan was placed by ACE at a religious school in Baton Rouge, Louisiana during both the 1999-2000 and the 2000-2001 school years. In her first year, Ms. Duggan taught only religion; she also led her students in prayer at the beginning of each class, as the school required her to do. Ms. Duggan reported to the Corporation that she performed more than 1700 hours of AmeriCorps service and she earned the $4,725 education award. *See id.*, ¶ ¶ 106-109. According to the Corporation, Ms. Duggan "fulfilled her AmeriCorps requirements through supervision of extracurricular activities." Def.'s Opp'n, at 14.

AmeriCorps participant Cynthia Ihm Lasage was placed in a religious school in New York during the 1997-1998 school year through the Vincentian Service Corps ("VSC").[9] VSC's mission statement during the relevant time period stated, "Responding to the call of the gospel, in the spirit of St. Vincent de Paul, lay women and men of the

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[9] Plaintiff claims that at the time Ms. Lasage was an AmeriCorps participant, the VSC was administered by the CNVS. According to the Corporation, during the relevant time period, the VSC was administered by the National Council of Churches. *See* Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 119.

Vincentian Service Corps serve those who are poor, while growing in prayer and living simply in community." Pl.'s Statement of Facts, ¶ 119. Ms. Lasage taught 3 religion courses each day to students in the sixth, seventh, and eighth grades. She also attended Mass and prayed with her students.

When Ms. Lasage completed her service, she wrote a letter to the Corporation which stated that her position "was that of a religious educator." *Id.*, at 124. The letter also stated that "[m]ostly I taught the students to adhere to values as defined by the Judeo-Christian religion on which this country is founded." *Id.* Ms. Lasage's letter expressed concern as to whether, given her role as a religious educator, she should be entitled to her AmeriCorps education award. The Corporation granted Ms. Lasage the $4,725 education award after it reviewed her service activities and she provided a second certification. Def.'s Opp'n to Pl.'s Statement of Facts, ¶ 126.

The Corporation does not dispute that AmeriCorps participants, "on their own time," teach classes in religion, or participate in other religious activities. The Corporation categorically denies that any of the four individuals cited by Plaintiff received an education award for hours that included time spent in religious activities.[10]

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[10] According to the Corporation, Ms. Duggan is the only AmeriCorps participant who taught only religion. Def.'s Statement of Facts, ¶ 107. The Corporation contends that Notre Dame has since changed its policy to prohibit AmeriCorps participants from teaching only religion. *See* Def.'s Opp'n, at 14.

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D. Direct Monetary Grants to Faith-Based AmeriCorps EAP Grantees

Each grantee in the AmeriCorps EAP receives a monetary grant from the Corporation of up to $400 per year for every full-time AmeriCorps participant that it enrolls. While the Corporation provides these grants "to assist with program-management costs," *id.*, ¶ 207, it "does not require grantees to account for the uses of these funds" because it claims that "the legitimate needs of administering the program, at the grantee level and below, are expected to exceed the amount of the $400 grants." Oltmann Decl., ¶ 12. The Corporation points out that "the grantees referred to in the complaint affirmatively attest that no portion of the [ ] grants is used for religious activities." Def.'s Opp'n, at 42.

The ACE deposits these grants into a restricted account and uses them to help pay the salaries of the faculty members who teach secular subjects. Staud Decl., ¶ 12. These funds cover approximately 8 percent of the faculty members' salaries. *Id.*

The CNVS does not segregate these funds into a separate account; rather, it deposits all of the funding it receives into a single, general checking account. CNVS shares $120 of each $400 grant with its member organizations. According to James G. Lindsay, Executive Director of the CNVS, "[a]t the CNVS level, the[ ] funds are used for management costs, including program staff salaries, training, supplies, postage, conference fees, and technical assistance." Lindsay Decl., ¶ 11. CNVS's member organizations use their $120 portion "to cover management costs, including program staff salaries, monitoring, reporting, training, supplies, and postage." *Id.*, ¶ 12.

Appendix B

E. Procedural History

Plaintiff filed the instant action in October 2002. Plaintiff seeks

> a judicial declaration that it is contrary to law (1) for the Corporation to approve or qualify the ACE Program, CNVS Program, and Nebraska Program, and any other similar AmeriCorps program, to place AmeriCorps participants as religion teachers in private sectarian schools; (2) for the Corporation to provide or administer federal financial assistance, including educational awards, for AmeriCorps participants who teach religion in private sectarian schools; and (3) for the Corporation to fund, directly or indirectly, the religious activities of the ACE Program, CNVS Program, and Nebraska Program, and any other similar AmeriCorps program.

Compl., at 14. Plaintiff also seeks "permanent injunctive relief requiring the Corporation to conform its conduct to such judicial declaration." *Id.*

On December 15, 2003, the parties filed the instant three Motions for Summary Judgment.

II. Standard of Review on a Motion for Summary Judgment

Summary judgment should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits or

declarations, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56. Material facts are those that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party then must "go beyond the pleadings and by [its] own affidavits, or by 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. 2548. *See Laningham v. U.S. Navy*, 813 F.2d 1236, 1242 (D.C.Cir.1987) (nonmoving party has affirmative duty "to provide evidence that would permit a reasonable jury to find" in its favor); *Crenshaw v. Georgetown Univ.*, 23 F.Supp.2d 11, (D.D.C.1998) (noting that "adverse party must do more than simply 'show that there is some metaphysical doubt as to the material facts'" (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986))).

In deciding a motion for summary judgment, "the court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). *See Washington Post Co. v. U.S. Dep't of Health and Human Servs.*, 865 F.2d 320, 325 (D.C.Cir.1989). Ultimately, the court must determine "whether the evidence presents a sufficient disagreement to

require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52, 106 S.Ct. 2505.

III. The Applicable Law for Evaluating Church-State Relations Under the Establishment Clause

The Establishment Clause states that "Congress shall make no law respecting an establishment of religion...." U.S. Const. amend. I. The touchstone for evaluating church-state relations under the Establishment Clause is the test enunciated by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), as modified by *Agostini v. Felton*, 521 U.S. 203, 232, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). As originally formulated, the *Lemon* test required that "a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement with religion." *Lemon*, 403 U.S. at 612-13, 91 S.Ct. 2105. In *Agostini*, the Supreme Court modified the *Lemon* test in cases involving school aid, emphasizing the continuing vitality of the first two prongs of *Lemon*, but concluding that *Lemon*'s entanglement inquiry could be considered "as simply one criterion relevant to determining a statute's effect." *Mitchell v. Helms*, 530 U.S. 793, 808, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (Thomas, J., plurality). *See Agostini*, 521 U.S. at 232-33, 117 S.Ct. 1997. Thus, when presented with Establishment Clause challenges, the reviewing court is required to ask "'whether the government acted with the purpose of advancing or inhibiting religion' and 'whether the aid has the effect of advancing or inhibiting religion.'" *Mitchell*, 530 U.S. at 845, 120 S.Ct. 2530

(O'Connor, J., concurrence) (quoting *Agostini*, 521 U.S. at 222-23, 117 S.Ct. 1997).

Plaintiff concedes that the AmeriCorps EAP was enacted for the valid secular purpose of "expand[ing] educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training...." 42 U.S.C. § 12501(b)(3). Thus, the question presented is whether the AmeriCorps EAP, by (1) placing AmeriCorps participants as teachers in religious schools and allowing them to teach religion to their students throughout the school day, lead their students in prayer multiple times a day, and attend Mass with their students; and by (2) providing monetary grants of up to $400 per year to faith-based AmeriCorps EAP grantees for every full-time AmeriCorps participant the grantees enroll, has the "effect" of advancing religion.

In *Agostini*, the Court used "three primary criteria" to evaluate whether government aid has the effect of advancing religion: "(1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion." *Mitchell*, 530 U.S. at 845, 120 S.Ct. 2530 (O'Connor, J., concurrence). These same factors are used to evaluate whether a government-aid program constitutes an unconstitutional government "endorsement" of religion. *Id.*

Plaintiff does not assert that the challenged portions of the AmeriCorps EAP program either define its recipients by reference to religion or foster excessive governmental entanglement with religion. Consequently, the Court need only examine whether the challenged portions of the

AmeriCorps EAP result in governmental indoctrination. To meet this criterion, Plaintiff must establish that (1) the government funding of the challenged portions of the AmeriCorps EAP constitutes indoctrination or results in it; and (2) that such indoctrination is attributable to the government. *See DeStefano*, 247 F.3d at 414 (citing *Agostini*, 521 U.S. at 226, 117 S.Ct. 1997).[11]

IV. Analysis

A. The Government Funding of the Challenged Portions of the AmeriCorps EAP Results in Impermissible Government Indoctrination

To "indoctrinate" means "[t]o instruct in a body of doctrine or principles.... To imbue with a partisan or ideological point of view...." The American Heritage Dictionary of the English Language 984 (4th ed. 2000). The Supreme Court uses "indoctrination" synonymously with "inculcation." *See Mitchell*, 530 U.S. at 858-59, 120 S.Ct.

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[11] Plaintiff relies heavily in its briefs on *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) in support of this claim. However, the precedential value of that case was severely undercut by the Supreme Court's decision in *Agostini*, 521 U.S. at 222, 117 S.Ct. 1997, rejecting the three major assumptions on which *Ball* rested:

> (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

2530 (O'Connor, J., concurrence); *Agostini*, 521 U.S. at 223-24, 117 S.Ct. 1997. To "inculcate" is "[t]o impress (something) upon the mind of another by frequent instruction or repetition; [to] instill." American Heritage Dictionary at 889 (also using "indoctrinate" as a synonym for "inculcate").

In *Mitchell*, the Supreme Court concluded that it is "inappropriate to presume inculcation of religion" by publicly funded teachers in religious schools. *Mitchell*, 530 U.S. at 858, 120 S.Ct. 2530 (O'Connor, J., concurrence). *See Agostini*, 521 U.S. at 223-24, 117 S.Ct. 1997 (plaintiff raising an Establishment Clause challenge must present evidence that the government aid in question has resulted in religious indoctrination); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 13, 113 S.Ct. 2462, 125 L.Ed.2d 1 (1993) (rejecting presumption of indoctrination because it constitutes a "flat rule, smacking of antiquated notions of 'taint,' [that] would indeed exalt form over substance"). In the instant case, however, it is unnecessary to rely on any such presumption in order to conclude that the teaching of religion by AmeriCorps participants in religious schools inculcates religion. This is because the parties do not deny that the faith-based AmeriCorps EAP grantees at issue in the instant case inculcate religion, primarily through the classroom work of their teachers. Thus, it is clear that the government funding of the challenged portions of the AmeriCorps EAP results in indoctrination.

The Establishment Clause, however, bars indoctrination only if it "could reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809, 120 S.Ct. 2530 (Thomas, J., plurality). Accordingly, simply because a government-funded program engages in indoctrination does not mean that the program's funding is unconstitutional.

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In distinguishing between indoctrination that is and is not attributable to governmental action, the Supreme Court has "consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion." *Id.*

In its plurality opinion in *Mitchell*, the Supreme Court explained that "[i]f the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[12] *Id.* While Justice Thomas' plurality opinion emphasizes that the neutrality of aid criteria is the most important factor in considering the effect of a government aid program, *see Mitchell*, 530 U.S. at 809-10, 120 S.Ct. 2530, five Justices in *Mitchell* explicitly disagreed with Justice Thomas' discussion on this point. *See id.*, at 839, 120 S.Ct. 2530 (O'Connor, J., concurrence, joined by Breyer, J.) (neutrality "is by no means the only axiom in the history and precedent of the Establishment Clause") (internal citation omitted); *id.*, at 884, 120 S.Ct. 2530 (Souter, J., dissent, joined by Stevens, J. and Ginsburg, J.) (same). Under these circumstances, "Justice O'Connor's position on this issue ... is [ ] the majority view of the Supreme Court."[13] *DeStefano*, 247 F.3d at 418. *See Gentala v. City of Tucson*, 244 F.3d

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[12] Chief Justice Rehnquist and Justices Scalia and Kennedy joined Justice Thomas in the plurality opinion.

[13] *See King v. Palmer*, 950 F.2d 771, 780 (D.C.Cir.1991) ("'[W]hen the Court issues fragmented opinions, the opinion of the Justices concurring in the judgment on the 'narrowest grounds' should be regarded as the Court's holding.'") (quoting *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977)).

1065, 1076 (9th Cir.2001) (same); *Columbia Union College v. Oliver,* 254 F.3d 496, 504 (4th Cir.2001) (same). Therefore, while the neutrality of aid criteria is an important factor, it is "not alone sufficient to qualify the aid as constitutional." *Mitchell,* 530 U.S. at 840, 120 S.Ct. 2530 (O'Connor, J., concurrence).

In addition to "neutrality," the Supreme Court has "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Id.,* at 810, 120 S.Ct. 2530 (Thomas, J., plurality) (quoting *Agostini,* 521 U.S. at 226, 117 S.Ct. 1997). *See Zelman v. Simmons-Harris,* 536 U.S. 639, 651, 122 S.Ct. 2460, 153 L.Ed.2d 604 (2002) (inquiry is "whether [aid] recipients generally [are] empowered to direct the aid to schools or institutions of their own choosing").

In *Mitchell,* the Supreme Court also held that the Establishment Clause "requires that aid to religious schools not be impermissibly religious in nature." *Mitchell,* 530 U.S. at 820, 120 S.Ct. 2530 (Thomas J., plurality). "So long as the governmental aid is not itself 'unsuitable for use in the public schools because of its religious content,' and eligibility for aid is determined in a constitutionally permissible manner, any use of that aid to indoctrinate cannot be attributed to the government and is thus not of constitutional concern." *Id.,* at 820, 120 S.Ct. 2530 (Thomas J., plurality) (quoting *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen,* 392 U.S. 236, 245, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968) (permitting the provision of secular textbooks the content of which had been approved by the public school authorities as appropriate for use in public schools)). *See Agostini,* 521 U.S. at 223-25, 117 S.Ct. 1997 (approving the

use of public employees to teach secular remedial classes in private schools, in part, because there was no reason to suspect that religious indoctrination would be part of such governmental aid); *Zobrest*, 509 U.S. at 13, 113 S.Ct. 2462 (emphasizing the presence of private choice and the absence of government-provided sectarian content).

In sum, a government aid program does not result in impermissible governmental indoctrination if "it determines eligibility for aid neutrally, allocates that aid based on ... private choice[ ] ..., and does not provide aid that has an impermissible content." *Mitchell*, 530 U.S. at 829, 120 S.Ct. 2530 (Thomas, J., plurality).

1. The Corporation does not determine eligibility for government aid neutrally

It is clear from the record in the instant case that the Corporation does not offer aid "to a broad range of groups or persons without regard to their religion" and therefore does not determine eligibility for government aid neutrally. *Mitchell*, 530 U.S. at 809, 120 S.Ct. 2530 (Thomas, J., plurality).

First, the Corporation uses highly discretionary criteria – as opposed to fixed, objective, measurable criteria – to pick and choose among potentially qualifying AmeriCorps EAP grantees. For example, it assesses the extent to which the grantee applicant (1) "identifies a compelling need and describes how that need was identified," Oltmann Decl., ¶ 15; and (2) "[b]ring[s] together people of different backgrounds." Second Oltmann

Decl., Ex. B, at 41.[14] In direct contrast, the government aid program upheld by the Supreme Court in *Zelman* distributed benefits to every family below a stated income level which lived in a designated geographic area. *See Zelman*, 536 U.S. at 646, 122 S.Ct. 2460. Similarly, the government aid program upheld by the Supreme Court in *Zobrest* distributed benefits "neutrally to any child qualifying as 'disabled' under the [statute]...." *Zobrest*, 509 U.S. at 9, 113 S.Ct. 2462. *See Mueller v. Allen*, 463 U.S. 388, 398, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (the challenged law "permits *all* parents ... to deduct their children's educational expenses") (emphasis in original).

Second, a number of programs openly require that AmeriCorps participants be of a particular faith. For example, a recent search of the CNVS online "Response Directory" revealed programs such as the Pacific Alliance for Catholic Education, which listed among its requirements that participants "[m]ust be Catholic," *id.*, at 21, 113 S.Ct. 2462; the Franciscan Volunteer Ministry, which listed among its requirements that participants are required to be "[d]ependable and flexible Christian men and women," *id.*; and Red Cloud Volunteers, which listed among its requirements that participants are required to be "Christian." *Id.*

Thus, given the record in the instant case which shows not only that the Corporation uses highly

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[14] The fact that there are substantial inconsistencies between the selection criteria as outlined in the 2004 AmeriCorps Guidelines and the selection criteria as explained by Oltmann in his Declaration illustrates the extent of discretion the Corporation enjoys in the grantee selection process.

discretionary criteria to select among potentially qualifying grantees, but also that a number of programs actually list among their requirements that AmeriCorps participants must be of a particular faith, it is clear that the Corporation does not determine eligibility for government aid neutrally.

2. The AmeriCorps EAP is not a program of "true private choice"

In addition to "neutrality," the Supreme Court has "repeatedly considered whether any governmental aid that goes to a religious institution does so 'only as a result of the genuinely independent and private choices of individuals.'" *Mitchell,* 530 U.S. at 810, 120 S.Ct. 2530 (Thomas J., plurality) (quoting *Agostini,* 521 U.S. at 226, 117 S.Ct. 1997).

The Corporation maintains that the AmeriCorps EAP is analogous to other "private choice" programs upheld by the Supreme Court because here, "individual participants choose where to use the government benefits at issue." Def.'s Mot., at 26. Specifically, it argues that it is the AmeriCorps participants – not the government – who, through their choice of placement, determine which programs receive Corporation funds; the funds, the Corporation claims, follow the AmeriCorps participant.

However, the record demonstrates clearly that the AmeriCorps EAP is not a program of "true private choice." As a matter of Corporation policy, AmeriCorps participants may enroll only in programs that the Corporation has pre-approved. Thus, participants are not free to choose the program for which they will receive government funding.

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The Corporation also argues that the AmeriCorps EAP is similar to the private choice programs upheld by the Supreme Court in *Mueller* (permitting tax deductions for various educational expenses, including private school tuition); in *Witters v. Washington Dep't of Servs. For the Blind*, 474 U.S. 481, 106 S.Ct. 748, 88 L.Ed.2d 846 (1986) (offering vocational education scholarship to visually disabled seminarian not unconstitutional); in *Zobrest* (providing a sign language interpreter for deaf child in religious secondary school not unconstitutional); and in *Zelman* (allowing the state to provide vouchers to poor elementary and secondary school students to attend any public or private school). The cases cited by the Corporation are distinguishable for two reasons.

First, in the cases cited, the private individual had the statutory right to apply the government funding to any school program of his or her liking; in this way, the government aid was virtually an entitlement. In contrast, in the instant case, the AmeriCorps participants have no such free choice of placement because, as a matter of Corporation policy, AmeriCorps participants may enroll only in programs that it has pre-approved. Second, in the instant case, the grantees actively recruit and select AmeriCorps participants and a number of grantee programs actually list among their requirements that AmeriCorps participants must be of a particular faith.[15]

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[15] Grantees are responsible for recruiting and selecting AmeriCorps EAP participants for their individual programs. *See* Second Oltmann Decl., Ex. B, at 16. In fact, a key performance measure is the grantee's ability to enroll the number of full-time and less than full-time members agreed upon in its approved application. *See id.*

Thus, given the record in the instant case which shows that Corporation policy limits enrollment of AmeriCorps participants to programs that the Corporation has pre-approved, as well as that a number of programs actually list among their requirements that AmeriCorps participants must be of a particular faith, it is clear that the AmeriCorps EAP is not a program of "true private choice."

3. The AmeriCorps educational awards being challenged have an impermissible content

In *Mitchell,* the Supreme Court held that the Establishment Clause "requires that aid to religious schools not be impermissibly religious in nature." *Mitchell,* 530 U.S. at 820, 120 S.Ct. 2530 (Thomas J., plurality). It is clear from the record in the instant case that the $4,725 AmeriCorps education awards being challenged are in fact impermissibly religious in their nature and content.

The Corporation defends the operation of its EAP on the ground that its timekeeping policies are sufficient to ensure that the religious instruction undertaken by AmeriCorps participants during the school day is separate from their AmeriCorps service, and therefore the government aid in question does not have any impermissible content. Specifically, the Corporation maintains that its timekeeping policies ensure that the AmeriCorps participants are not given service hour credit toward their education award for the time they spend in religious activity. This argument must be rejected for two reasons.

First, the Corporation's monitoring efforts are totally inadequate to ensure that its timekeeping policies are followed. In *Bowen v. Kendrick,* 487 U.S. 589, 615, 108

S.Ct. 2562, 101 L.Ed.2d 520 (1988), the Supreme Court recognized the necessity and importance of an agency monitoring its grants. *See Agostini*, 521 U.S. at 234-35, 117 S.Ct. 1997 (upholding government aid program in part because it contained appropriate "safeguards"); *Mitchell*, 530 U.S. at 861, 120 S.Ct. 2530 (O'Connor, J., concurrence) (reviewing the monitoring mechanisms in place and concluding that "[t]he safeguards employed by the program are constitutionally sufficient").

The Corporation's monitoring efforts are clearly insufficient when measured against the programs at issue in the Supreme Court's recent cases. In *Agostini*, the Supreme Court found that the government aid program at issue employed appropriate "safeguards" where "a publicly employed field supervisor was to attempt to make *at least one unannounced visit to each teacher's classroom every month.*" *Agostini*, 521 U.S. at 212, 117 S.Ct. 1997 (emphasis added). In *Mitchell*, the state, among other monitoring measures, conducted "*annual monitoring visits to each of the nonpublic schools* receiving Chapter 2 aid." *Mitchell*, 530 U.S. at 862, 120 S.Ct. 2530 (O'Connor, J., concurrence) (emphasis added).

In contrast, in the instant case, the Corporation conducts only a handful of pre-announced site visits each year to religious schools in which AmeriCorps participants are serving as teachers. Moreover, as Plaintiff correctly points out, "even these infrequent, pre-announced site visits have revealed what one Corporation official has described as 'serious' infractions of the Corporation's policies."[16] Pl.'s

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[16] The Corporation maintains that "day-to-day monitoring of the AmeriCorps participants' timekeeping is more appropriately left to the

Opp'n, at 21.

Second, even if the Court assumes that the Corporation accurately estimates the time AmeriCorps participants spend on religious versus non-religious activities, it is not possible to clearly distinguish between the two roles the AmeriCorps participants supposedly play. AmeriCorps participants placed as teachers in religious schools teach religion throughout the school day, lead their students in prayer multiple times a day, and attend Mass with their students. In addition, one of the factors ACE uses in evaluating its AmeriCorps teachers is whether the teacher "provides a variety of prayer experiences" and "witnesses as a person of faith and prayer." Pl.'s Statement of Facts, ¶ 44. In short, the record makes clear that there is a total blurring of religious and non-religious activities.

It is also significant that the Corporation "expects" that its "Education Awards Programs and members take specific action to create an identity that includes AmeriCorps symbols and networks." Pl.'s Ex. A-2, at C 3347. Indeed, the concept of "AmeriCorps Identity," i.e., "the extent to which the provision of AmeriCorps funding is outwardly evident at the site," is one of the specific items that Corporation personnel look for when they conduct site visits at religious schools. Oltmann Decl., ¶ 52. Corporation

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grantees, which supervise and have direct knowledge of the particular activities of a host site – and not to the Corporation." Def.'s Opp'n, at 32. The Corporation also contends that the problems which Plaintiff points to "are *de minimis* – isolated instances by private parties who misunderstand the program's rules prohibiting any religious activities within the scope of AmeriCorps hours." *Id.*, at 33. Given the record in the instant case, these arguments are not persuasive.

personnel are also asked to inquire whether the program in question "identif [ies] itself, and ... the members identify themselves, with AmeriCorps, through the use of signs, T-shirts, sweatshirts, banners, logos that incorporate the A*C logo." Pl.'s Ex. A-2, at C 3347.

It is well established that "[a] school which operates to commingle religion with other instruction plainly cannot completely secularize its instruction." *Lemon,* 403 U.S. at 636-37, 91 S.Ct. 2105. *See Ball,* 473 U.S. at 384, 105 S.Ct. 3216 (citing *Meek v. Pittenger,* 421 U.S. 349, 356, 95 S.Ct. 1753, 44 L.Ed.2d 217 (1975), *overruled on other grounds,* ("The very purpose of many of those [religious] schools is to provide an integrated secular and religious education"), *Walz v. Tax Comm'n,* 397 U.S. 664, 671, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) ("to assure future adherents to a particular faith" is "an affirmative if not dominant policy of church schools"), *Lemon,* 403 U.S. at 657, 91 S.Ct. 2105 ("[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within that institution, the two are inextricably intertwined.")).

Thus, it is clear from the record in the instant case that the Corporation's monitoring efforts are not adequate to ensure that its timekeeping policies are followed, and thus that the government aid in question does not have an impermissible content. Moreover, even if the Court assumed that the Corporation could accurately estimate the time AmeriCorps participants spend on religious versus non-religious matters, it is not possible to clearly distinguish between the two roles the AmeriCorps participants are

supposed to play.[17]

B. The Monetary Grants that the Corporation Provides Directly to Faith-Based AmeriCorps EAP Grantees Are Unconstitutional

The standard for evaluating the constitutionality of direct monetary aid announced in *Comm. For Public Educ. v. Nyquist,* 413 U.S. 756, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) is controlling in the instant case.[18] In *Nyquist,* the Supreme Court held that "[i]n the absence of an effective

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[17] The Corporation maintains that "Supreme Court precedent has established that the mere presence of AmeriCorps participants in religious schools does not result in governmental indoctrination, any more than such indoctrination occurs because of the presence, in religious schools, of public school teachers (upheld in *Agostini*) or government-loaned instructional equipment (upheld in *Mitchell*)." Def.'s Opp'n, at 16. This argument is unconvincing because in the cases cited by the Corporation, the Supreme Court found no establishment clause violation where public support was provided for specifically identified secular Title I services, *see Agostini,* 521 U.S. at 211, 117 S.Ct. 1997, or educational materials and equipment, *see Mitchell,* 530 U.S. at 801, 120 S.Ct. 2530 (Thomas, J., plurality). In contrast, in the instant case, the Corporation chooses to fund faith-based grantees. This distinguishes the instant case from those in which the government sponsored supplementary educational aids that were inherently secular, but allowed their recipients to divert the funds to purchase that supplementary aid for sectarian purposes.

[18] In *Zelman,* the Supreme Court expressly held that "*Nyquist* does not govern neutral educational assistance programs that ... offer aid directly to a broad class of individuals defined without regard to religion." *Zelman,* 536 U.S. at 641, 122 S.Ct. 2460. As discussed *supra,* the Corporation does not determine eligibility for government aid neutrally. Accordingly, the instant case fits squarely within the category of cases governed by *Nyquist.*

means of guaranteeing that the [government] aid derived from public funds will be used *exclusively* for secular, neutral, and nonideological purposes, ... direct aid in whatever form is invalid." *Nyquist,* 413 U.S. at 780, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973) (emphasis added).

Under *Nyquist,* the $400 grants that the Corporation provides directly to faith-based AmeriCorps EAP grantees are unconstitutional.[19] It is undisputed that the Corporation "does not require grantees to account for the uses of these funds" because it claims that the secular administrative costs of the AmeriCorps EAP are "expected" to exceed the amount of the grant, thus ensuring that the grant is expended entirely on secular activities. Oltmann Decl., ¶ 12. In support of this argument, the Corporation points out that "the grantees referred to in the complaint affirmatively attest that no portion of the [ ] grants is used for religious activities." Def.'s Opp'n, at 42.

The Corporation's "expectation" that the grantees

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[19] The Corporation argues that because "these payments are based on the number of AmeriCorps participants enrolled with the grantee, and depend entirely upon the choice of the individual participants to serve through that organization," "[r]ather than 'direct aid,' [ ] the [ ] grants are similar to the 'private-choice' programs upheld by the Supreme Court." Def.'s Opp'n, at 43. This argument is not supported by Supreme Court case law. These grants are "direct aid" rather than the result of "private choice" because the grants are paid directly to the faith-based grantees rather than through an intermediary. *See Mitchell,* 530 U.S. at 842-43, 120 S.Ct. 2530 (O'Connor, J., concurrence) ("a government program of direct aid to religious schools based on the number of students attending each school differs meaningfully from the government distributing aid directly to individual students who, in turn, decide to use the aid at the same religious schools").

will spend the direct monetary grants on secular administrative costs – without actually requiring any segregation or accounting for the use of the grants – is not sufficient to render the grants constitutional. *See Nyquist*, 413 U.S. at 778, 93 S.Ct. 2955, 37 L.Ed.2d 948 ("a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education").

Thus, the direct $400 grant that the Corporation provides directly to faith-based AmeriCorps EAP grantees for each AmeriCorps participant is unconstitutional because it is clear from the record that the Corporation requires no segregation or accounting for the use of those funds so as to ensure that the money is spent only on secular activities.[20]

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[20] The Corporation cites to *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976) and *Comm. for Public Educ. and Religious Liberty v. Regan*, 444 U.S. 646, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) in support of its claim that the $400 grants that it provides directly to faith-based AmeriCorps EAP grantees are constitutional. *Roemer*, which approved segregated funds after finding recipients not pervasively religious, is inapposite and *Regan* is distinguishable. In *Regan*, the Court upheld a New York statute which authorized the use of public funds to reimburse religious schools for performing various testing and reporting services mandated by state law partly because the challenged statute "provide[d] ample safeguards against excessive or misdirected reimbursement." *Regan*, 444 U.S. at 659, 100 S.Ct. 840. In the instant case, as discussed *supra*, the Corporation's monitoring efforts are not sufficient to ensure that the Corporation's timekeeping policies are followed, and thus that the government aid in question does not have an impermissible content.

C. The Court's Decision to Grant Plaintiff's Motion Does Not Require AmeriCorps Participants to Surrender Their First Amendment Rights

The Corporation argues that sustaining Plaintiff's challenge in the instant case would require AmeriCorps participants to "surrender their constitutionally protected rights to engage in certain religious exercise and speech activities on their own time." Def.'s Opp'n, at 2. This argument is totally without merit and borders on the disingenuous. It is clear from both Plaintiff's briefs and its representations at oral argument that Plaintiff is not asking the Court to restrict in any way the truly private religious activity and speech of AmeriCorps participants. It is also clear that the Court's decision to grant Plaintiff's Motion "does not require [AmeriCorps participants] to choose between their religious beliefs and receiving a government benefit." *Locke v. Davey*, 540 U.S. 712, 124 S.Ct. 1307, 1312-13, 158 L.Ed.2d 1 (2004) (holding that Washington State's restriction on the use of a state scholarship to pursue a theological degree did not violate the free exercise clause of the First Amendment). AmeriCorps participants placed as teachers in religious schools are free to attend any religious service and observe any religious tradition on their own time, i.e., outside of and separate from their AmeriCorps teaching assignments. Thus, the Court's decision to grant Plaintiff's Motion does not require AmeriCorps participants to surrender their First Amendment rights.

V. CONCLUSION

For the reasons stated, Plaintiff's Motion is **granted,** the Corporation's Motion is **denied,** and Notre Dame's Motion is **denied.**

Appendix B

An Order will issue with this opinion.

ORDER

Plaintiff, the American Jewish Congress, brings this action against the Corporation for National and Community Service ("Corporation"). The University of Notre Dame ("Notre Dame") is a Defendant-Intervenor. This matter is now before the Court on three Motions for Summary Judgment filed by Plaintiff, the Corporation, and Notre Dame. Upon consideration of the Motions, Oppositions, Replies, the June 2, 2004 Motions Hearing, and the entire record herein, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for Summary Judgment is **granted**; it is further

ORDERED that the Corporation's Motion for Summary Judgment is **denied**; it is further

ORDERED that Notre Dame's Motion for Summary Judgment is **denied**.

Appendix C

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED AUGUST 5, 2005

United States District Court,
District of Columbia.
AMERICAN JEWISH CONGRESS, Plaintiff,
v.
CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, Defendant,
University of Notre Dame, Defendant-Intervenor.
No. CIV.A. 02-1948(GK).

ORDER GRANTING INJUNCTIVE RELIEF

On July 2, 2004, the Court found that the AmeriCorps Education Awards Program ("EAP") being challenged by Plaintiff American Jewish Congress in the above-captioned case results in impermissible government indoctrination in violation of the establishment clause of the First Amendment and granted summary judgment to Plaintiff. Upon consideration of the Notice by Plaintiff of Filing of Proposed Order Granting Injunctive Relief, and the Opposition thereto filed by Defendant Corporation for National and Community Service ("Corporation") and Defendant-Intervenor University of Notre-Dame, it is hereby

ORDERED that the Corporation, its officers, agents, servants, employees, attorneys and any persons acting in active concert or participation with the Corporation, are barred and enjoined from providing, awarding, or authorizing the provision or award of any federal financial assistance, including Education Awards, to AmeriCorps

participants who are placed as teachers in private sectarian schools pursuant to the AmeriCorps EAP and engage in impermissible government indoctrination, including the teaching of religion to students during the school day, the leading of students in prayer during the school day, and the attending of Mass with students during the school day. This injunction applies to all such AmeriCorps participants as of the date of entry of this Order. It is further

ORDERED that the Corporation, its officers, agents, servants, employees, attorneys and any persons acting in active concert or participation with the Corporation, are barred and enjoined from providing, awarding, or authorizing the provision or award of direct public funding to AmeriCorps EAP grantees which place AmeriCorps participants as teachers in private sectarian schools pursuant to the AmeriCorps EAP[1] unless and until such time as the Corporation can demonstrate to this Court that it has established appropriate and sufficient accounting and monitoring procedures to ensure that such funding is devoted exclusively to secular use and that AmeriCorps participants do not receive public funding for the time they spend in religious activity. This injunction applies to all such AmeriCorps EAP grantees as of the date of entry of this Order. It is further

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[1] By definition, this language excludes the separate training and technical assistance grant to the Catholic Network of Volunteer Services, mentioned by the Corporation in its Response and Opposition on page 3.

ORDERED that this Court shall retain continuing jurisdiction to enforce this Order in accordance with its terms.

August 5, 2004

/s/
GLADYS KESSLER
U.S. District Judge

Appendix D

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED JUNE 1, 2005, DENYING AJC'S PETITION FOR REHEARING EN BANC

No. 04-5317 **September Term, 2004**

Filed On: June 1, 2005

The American Jewish Congress,
Appellee

v.

Corporation for National and Community Service,
Appellant

University of Notre Dame,
Appellee [*sic*]

Consolidated with 04-5318

BEFORE: Ginsburg,* Chief Judge, and Edwards, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland,* and Roberts, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

Appendix D

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

*Chief Judge Ginsburg and Circuit Judge Garland did not participate in this matter.

Appendix E

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 12634

(a) Prohibited uses

No assistance made available under a grant under this subchapter shall be used to provide religious instruction, conduct worship services, or engage in any form of proselytization.

(b) Political activity

Assistance provided under this subchapter shall not be used by program participants and program staff to –

(1) assist, promote, or deter union organizing; or

(2) finance, directly or indirectly, any activity designed to influence the outcome of an election to Federal office or the outcome of an election to a State or local public office.

(c) Contracts or collective bargaining agreements

A program that receives assistance under this subchapter shall not impair existing contracts for services or collective bargaining agreements.

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42 U.S.C. § 12635

§ 12635. Nondiscrimination

(a) In general

(1) Basis

An individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate against a participant in, or member of the staff of, such project on the basis of race, color, national origin, sex, age, or political affiliation of such participant or member, or on the basis of disability, if the participant or member is a qualified individual with a disability.

(2) "Qualified individual with a disability" defined

As used in paragraph (1), the term "qualified individual with a disability" has the meaning given the term in section 12111(8) of this title.

(b) Federal financial assistance

Any assistance provided under this subchapter shall constitute Federal financial assistance for purposes of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), and the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), and shall constitute Federal financial assistance to an education program or activity for purposes of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.).

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(c) Religious discrimination

(1) In general

Except as provided in paragraph (2), an individual with responsibility for the operation of a project that receives assistance under this subchapter shall not discriminate on the basis of religion against a participant in such project or a member of the staff of such project who is paid with funds received under this subchapter.

(2) Exception

Paragraph (1) shall not apply to the employment, with assistance provided under this subchapter, of any member of the staff, of a project that receives assistance under this subchapter, who was employed with the organization operating the project on the date the grant under this subchapter was awarded.

(d) Rules and regulations

The Chief Executive Officer shall promulgate rules and regulations to provide for the enforcement of this section that shall include provisions for summary suspension of assistance for not more than 30 days, on an emergency basis, until notice and an opportunity to be heard can be provided.

Appendix E

45 C.F.R. § 2520.30 (2001)

§ 2520.30 Are there any activities that are prohibited?

Yes. Some activities are prohibited altogether. Although all prohibited activities may be performed voluntarily by participants on their own time, they may not be performed by participants in the course of their duties, at the request of program staff, or in a manner that would associate the activities with the AmeriCorps program or the Corporation. These activities include:

(a) Any effort to influence legislation, as prohibited under section 501(c) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c));

(b) Organizing protests, petitions, boycotts, or strikes;

(c) Assisting, promoting or deterring union organizing;

(d) Impairing existing contracts for services or collective bargaining agreements;

(e) Engaging in partisan political activities, or other activities designed to influence the outcome of an election to any public office;

(f) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;

(g) Providing a direct benefit to –

(1) A business organized for profit;

(2) A labor union;

(3) A partisan political organization;

(4) A nonprofit organization that fails to comply with the restrictions contained in section 501(c) of the Internal Revenue Code of 1986 except that nothing in this section shall be construed to prevent participants from engaging in advocacy activities undertaken at their own initiative; and

(5) An organization engaged in the religious activities described in paragraph (e) of this section, unless Corporation assistance is not used to support those religious activities; and

(h) Such other activities as the Corporation may prohibit.

45 C.F.R. § 2520.30 (2002)

§ 2520.30 What activities are prohibited in AmeriCorps subtitle C programs?

(a) While charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation, staff and members may not engage in the following activities:

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(1) Attempting to influence legislation;

(2) Organizing or engaging in protests, petitions, boycotts, or strikes;

(3) Assisting, promoting, or deterring union organizing;

(4) Impairing existing contracts for services or collective bargaining agreements;

(5) Engaging in partisan political activities, or other activities designed to influence the outcome of an election to any public office;

(6) Participating in, or endorsing, events or activities that are likely to include advocacy for or against political parties, political platforms, political candidates, proposed legislation, or elected officials;

(7) Engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization;

(8) Providing a direct benefit to –

(i) A business organized for profit;

(ii) A labor union;

(iii) A partisan political organization;

(iv) A nonprofit organization that fails to comply with the restrictions contained in section 501(c)(3) of the Internal Revenue Code of 1986 except that nothing in this section shall be construed to prevent participants from engaging in advocacy activities undertaken at their own initiative; and

(v) An organization engaged in the religious activities described in paragraph (g) of this section, unless Corporation assistance is not used to support those religious activities; and

(9) Such other activities as the Corporation may prohibit.

(b) Individuals may exercise their rights as private citizens and may participate in the activities listed above on their initiative, on non-AmeriCorps time, and using non-Corporation funds. Individuals should not wear the AmeriCorps logo while doing so.

No. 05-282

In the Supreme Court of the United States

AMERICAN JEWISH CONGRESS, PETITIONER

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The AmeriCorps Education Awards program provides a $4725 scholarship to individuals who perform at least 1700 hours of secular public service in programs sponsored by a wide range of organizations. The program also gives sponsoring organizations $400 for each individual who performs public service with that organization to help defray the program's administrative costs. The questions presented are:

1. Whether affording individuals who perform the requisite hours of secular public service by teaching secular subjects in a religious school an equal opportunity to obtain an educational award violates the Establishment Clause because those individuals may make an independent choice to engage in religious instruction or activities on their own time.

2. Whether the Establishment Clause prohibits providing religiously-affiliated sponsoring organizations the same $400 payment provided to all sponsors to help defray the administrative costs of participation in the program, where the money is provided to the institution only as a result of the independent choice of private individuals to select that sponsoring organization and where the payment is significantly less than the actual administrative costs incurred.

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In the Supreme Court of the United States

No. 05-282

AMERICAN JEWISH CONGRESS, PETITIONER

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 399 F.3d 351. The opinion and order of the district court (Pet. App. 13a-55a) are reported at 323 F. Supp. 2d 44.

JURISDICTION

The court of appeals entered its judgment on March 8, 2005. The court of appeals denied a petition for rehearing on June 1, 2005 (Pet. App. 59a-60a). The petition for a writ of certiorari was filed on August 30, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the National and Community Service Act of 1990 (Community Service Act), 42 U.S.C. 12501 *et seq.*, to "meet the unmet human, educational, environmental, and public safety needs of the United States" and to "expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education." 42 U.S.C. 12501(b)(1) and (3). In the Community Service Act, Congress created the Corporation for National and Community Service (Corporation), 42 U.S.C. 12651, to administer the Act and to oversee a variety of programs, operations, and grants designed to promote service to the public.

An important goal of the Community Service Act is the provision of financial rewards to individuals who participate in national service, which will permit those persons to pursue higher education or job training. 42 U.S.C. 12501(b)(3). One such program is the AmeriCorps Education Awards program. 61 Fed. Reg. 46,628 (1996). That program provides financial awards (currently, $4725) to individuals who have completed 1700 hours of national service over a nine- to twelve-month period in an approved service program. 42 U.S.C. 12593(b)(1), 12602(a)(1) and (b); Pet. App. 3a. Those awards may be used to pay the participant's student loans, college expenses, or job-training expenses.

Under the Education Awards program, the Corporation selects a wide range of sponsors who oversee or administer community service programs at host sites, the work of which will qualify an individual to receive an AmeriCorps education award. Such host sites must undertake public-service activities that address the social,

educational, environmental, or public safety needs of a community, see 42 U.S.C. 12501(a)(1), and "provide[] a direct and demonstrable benefit that is valued by the community," 45 C.F.R. 2522.100(a). Individuals may perform their public service through a wide range of programs, including working in "homeless shelters, health clinics, and schools." C.A. App. 747.

b. Sponsoring organizations must be willing to "engage Americans of all backgrounds as members in community-based service," C.A. App. 1489, and "shall not discriminate on the basis of religion" in selecting individuals to perform public service with them, 42 U.S.C. 12635(c)(1); 45 C.F.R. 2540.210(a). The sponsors are typically state and local governments, Indian tribes, and both secular and religious non-profit organizations.

In determining whether a sponsor is qualified to offer public service opportunities under the Education Awards program, the Corporation does not take into account "the secular or religious nature of the applicants or the proposed host sites." C.A. App. 758. Instead, the Corporation considers the design of the proposed public-service programs, including an assessment of community needs and program performance measures. *Id.* at 1555-1556. The Corporation also considers the organizational capacity of an applicant, including its track record and ability to provide oversight, and the budget and cost-effectiveness of its proposed programs. *Id.* at 1556. Of the 34 current sponsoring organizations, 28 are secular and six are religious entities. *Id.* at 1663. Of the 19,000 individuals who sought education awards during fiscal year 2001, only 2000 chose to perform service under the sponsorship of religious organizations, and only 565 chose to work as teachers in private schools. *Id.* at 1582.

c. Individuals seeking to obtain public-service credit for an education award may not perform certain prohibited activities "[w]hile charging time to the AmeriCorps program, accumulating service or training hours, or otherwise performing activities supported by the AmeriCorps program or the Corporation." 45 C.F.R. 2520.30(a). The prohibited activities include "[e]ngaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, * * * or engaging in any form of religious proselytization." 45 C.F.R. 2520.30(a)(7). The individuals are, however, permitted to "participate in the [listed prohibited activities] on their initiative, on non-AmeriCorps time, and using non-Corporation funds. Individuals should not wear the AmeriCorps logo while doing so." 45 C.F.R. 2520.30(b).

Individuals seeking to earn an educational award must record their service hours on timesheets. Since 2001, the Corporation has required individuals who perform their service hours as teachers in religious schools to certify that none of their reported service hours "include[s] any religious instruction, worship, or proselytization." C.A. App. 754, 874. The Corporation also requires participants serving as teachers in religious schools to document on their timesheets the specific activities for which they are claiming service hours in fulfillment of their 1700-hour service commitment. *Id.* at 1203.

In addition, sponsors must document the hours of service performed by individuals that are credited to the AmeriCorps program and to enforce the rules against prohibited activities. C.A. App. 1505. Sponsors themselves must execute a set of "Assurances and Certifications" undertaking, among other things, to "ensure that

no assistance made available by the Corporation will be used to support" religious or other prohibited activities. *Id.* at 753, 866. Sponsors also must enter into "site agreements" with their host sites to ensure that all program requirements and grant provisions are followed. *Id.* at 754, 1493. And sponsors must enter into "member contracts" with the individuals working with them that preclude each individual from claiming service credit for prohibited activities. *Id.* at 753, 1493. Finally, sponsors must provide participants with a formal orientation that includes an explanation of prohibited activities. *Ibid.*

d. Because the sponsors are responsible for recruiting and training individuals to participate in their service programs and for supervising and documenting the service hours that render individuals eligible for an education award, the Corporation provides each sponsor a "fixed amount grant" of $400 for each individual that participates in the Education Awards program through that sponsor. C.A. App. 1562. In actuality, "the reasonable and necessary costs inherent in carrying out the program significantly exceed the amount of assistance provided by the Corporation." *Id.* at 748, 1562; Pet. App. 12a. The statute forbids the sponsor from using the $400 grant for sectarian purposes, *ibid.*; 42 U.S.C. 12634(a); 45 C.F.R. 2540.100(b), but does not otherwise require sponsors to document their use of the administrative payment.

e. To monitor compliance directly, the Corporation conducts both random and targeted site visits each year, including annual visits to between five and ten sponsors and to thirty or more host sites. C.A. App. 754-755. If the host site is a school, the Corporation interviews individual participants and supervisors to determine "the courses taught by each participant to accumulate Ameri-

Corps service hours." *Id.* at 755-756. The Corporation also assigns program officers to supervise each sponsor, requires each sponsor to submit annual progress reports, and reviews compliance and other program operation issues with each sponsor at least monthly. *Id.* at 757.

2. a. Asserting taxpayer standing, Pet. App. 4a, petitioner filed suit seeking to enjoin the Corporation from both crediting the secular public service hours performed by individuals with religiously affiliated sponsoring organizations and providing such sponsors the $400 grant to defray their administrative expenses, *id.* at 3a. The University of Notre Dame, one of six religiously-affiliated program sponsors, intervened in the case in defense of the program.

The district court granted summary judgment to petitioner. Pet. App. 13a-55a. The court held that the Education Awards program was not neutral, for Establishment Clause purposes, because (i) the criteria used to select sponsors involve an element of "discretion[]," *id.* at 43a; (ii) participating individuals generally must choose from among pre-approved sponsors, *id.* at 45a, and (iii) the program has an "impermissible content" when the participating individual engages in instruction in a religious school, *id.* at 47a. The district court also held that *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), categorically prohibits any direct payment of money to any religiously affiliated organization absent extensive monitoring procedures and account segregation to ensure that the money is used for exclusively secular purposes. Pet. App. 51a-53a. The court then enjoined the Corporation from providing both educational awards to individuals who serve as teachers in private sectarian schools and

$400 grants for administrative costs to religiously affiliated sponsoring organizations.

b. The court of appeals reversed. Pet. App. 1a-12a. The court held that the Education Awards program does not violate the Establishment Clause by failing to prohibit participants from teaching religion on their own time, and that the $400 grant was a permissible partial reimbursement for the costs of administering the program. The court determined that this Court's line of precedents "upholding programs of true private choice * * * control this case." *Id.* at 6a-7a (citing, *inter alia*, *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002)). The court concluded that the Education Awards program qualifies as a program of private choice, because the awards are available "to a broad class of citizens," chosen without regard to religion, "the AmeriCorps program creates no incentives for participants to teach religion," Pet. App. 7a, and participants who choose to teach at religious schools "do so only as a result of their own genuine and independent choice," *ibid.* (quotation marks omitted). The court further noted that individuals "may count only the time they spend engaged in non-religious activities toward their service hours requirement." *Ibid.*[1]

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[1] The court acknowledged that petitioner had submitted evidence suggesting that, since 1999, four participants might have improperly counted time spent teaching religion toward their service hours requirement, and that the government disputed that evidence. Pet. App. 10a. The court concluded, however, that, "[e]ven if we credited [petitioner's] version, it proves nothing of significance." *Ibid.* In the court's view, such *de minimis* evidence of diversion failed to establish that the program as a whole "is giving participants Education Awards for hours they spend teaching religion." *Id.* at 11a.

The court rejected petitioner's argument that the program was not neutral because the Corporation uses "discretionary" criteria in selecting grantees. Pet. App. 8a-9a. Because the discretionary criteria pertain to the secular purposes of the program, have no religious content, are neutral with respect to religion, and have not been used to favor religious organizations, as petitioner conceded (*id.* at 9a), the court of appeals could discern no reason "[w]hy, as a matter of constitutional law," the mere existence of some measure of judgment in the program ought to render the program an impermissible establishment of religion. *Id.* at 8a (citing *Bowen* v. *Kendrick*, 487 U.S. 589 (1988)).

The court of appeals also rejected petitioner's contention that an individual's decision to teach at a religious school is not a genuine and independent private choice because the government selects qualifying programs in advance. Pet. App. 9a. The court noted that the program provides manifold teaching opportunities at secular private and public schools—"only 328 of the 1608 schools employing AmeriCorps participants as teachers in 2001 were religious schools." *Id.* at 10a. The court also found no evidence that any individual who wanted to teach at a secular school had ever been compelled, by dint of a sponsor shortage, to teach at a sectarian school. The court of appeals accordingly held that an individual's choice to perform service hours in a religious setting was both genuine and independent. *Ibid.*

Finally, the court of appeals rejected petitioner's contention that the government was prohibited from partially reimbursing sponsoring programs for expenses related to administering the Education Awards program. The court noted that, in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646

(1980), this Court had upheld a program that similarly provided "direct cash reimbursement[s]" to religious and secular private schools for performing tests mandated by state law. Pet. App. 11a (quoting *Regan*, 444 U.S. at 657). The court recognized that the AmeriCorps program did not employ the same extensive audit procedures as in *Regan*, but reasoned that "here audits would be senseless," *id.* at 11a-12a, because the "evidence showed" that the $400 payment was "much less than the actual administrative costs grantees incur per participant," *id.* at 12a.

ARGUMENT

The unanimous decision of the court of appeals upholding the challenged provisions of the AmeriCorps Education Awards program against constitutional challenge is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, further review by this Court is not warranted.

1. a. Petitioner contends (Pet. 13-17) that the court of appeals' decision conflicts with this Court's decision in *School District of City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985). In *Ball*, this Court struck down two programs under which public school employees taught secular subjects on the grounds of pervasively sectarian schools during the school day (the "Shared Time" program) and after school (the "Community Education" program). *Id.* at 375-377. This Court held that those programs had the effect of promoting religion and unduly entangling government with religion in three respects: (i) the pervasively sectarian environment might cause public employees to indoctrinate students in religious matters; (ii) the symbolic union of church and state might convey a message of state support for religion to

the students; and (iii) the programs had the effect of financially subsidizing the students' religious education. *Id.* at 386-397.

As the court of appeals recognized (Pet. App. 6a-7a), this Court overturned "[m]uch of the reasoning in *Ball*" in *Agostini* v. *Felton*, 521 U.S. 203 (1997), as "inconsistent with our current understanding of the Establishment Clause." *Id.* at 236. In particular, *Agostini* rejected "the presumption erected in * * * *Ball* that the placement of public employees on parochial school grounds * * * constitutes a symbolic union between government and religion." *Id.* at 223. *Agostini* also discarded *Ball*'s presumption "that public employees will inculcate religion simply because they happen to be in a sectarian environment," and "abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully." *Id.* at 234.

Accordingly, petitioner's argument (Pet. 15) that the Education Awards program symbolically fuses or "blur[s]" the "religious and non-religious" by financially rewarding an individual for teaching secular subjects in a religious school classroom and by failing to disqualify the teacher if she engages in religious instruction on her own time depends upon the very "symbolic union" rationale from *Ball* that this Court expressly rejected in *Agostini*, 521 U.S. at 223. Petitioner's concerns that sponsors or individuals will improperly rely upon time engaged in religious activities to qualify an individual for an educational award (Pet. 19-20; Pet. App. 10a-11a) or that sponsors will impermissibly divert administrative reimbursements to proscribed religious activities (Pet. 21-25), likewise rest upon *Ball*'s now-rejected view that a sectarian environment might somehow cause individu-

als to fail to "to discharge their duties faithfully," *Agostini*, 521 U.S. at 234.

b. Petitioner's argument (Pet. 13) that the Education Awards program violates *Ball* because it "subsidize[s] the salaries of sectarian school teachers who engage in religious indoctrination" fundamentally misunderstands the program at hand. Individuals who participate in the AmeriCorps Education Awards program are *not* employees of the AmeriCorps program or public employees in any other sense. They do not work for AmeriCorps, they have no contract with AmeriCorps, and they receive no subsidy, stipend, or salary from AmeriCorps. Nor are they placed in a religious school by any government official. As the court of appeals stressed, the participants place themselves in the programs "only as the result of their own genuine and independent private choice." Pet. App. 7a (internal quotation marks omitted).

Petitioner's foundational assumption (Pet. 13) that AmeriCorps is somehow financing "religious indoctrination" is thus wholly misplaced. AmeriCorps offers no financial reward for teaching religion or leading students in prayer. To the contrary, the program explicitly prohibits the provision of an award for "[e]ngaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, * * * or engaging in any form of religious proselytization." 45 C.F.R. 2520.30(a)(7).

All that the Education Awards program does is decline to disqualify individuals who have performed the requisite secular work from receiving an award, just because those same individuals also engaged in religious activities on their own initiative. Furthermore, the pro-

gram prohibits individuals from crediting any time spent engaged in religious activities towards qualifying for an AmeriCorps education award, which eliminates any potential programmatic incentive to engage in those activities. 45 C.F.R. 2520.30(a).

That recognition of secular service performed in a religious setting is in no sense a governmental endorsement or inculcation of a religious message. It is simply a programmatic recognition that the value of the individual's secular contribution is not diminished or erased by the religius setting or participants' additional religious activities. And offering individuals the same post hoc financial award that all those who perform qualifying community service in a secular setting receive—a payment that the individual uses to meet her own personal educational expenses—bears little resemblance to the salary subsidies about which petitioner is concerned. Indeed, to design the program otherwise would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives." *Mitchell* v. *Helms*, 530 U.S. 793, 827-828 (2000) (plurality opinion).

As the court of appeals recognized (Pet. App. 7a-10a), this Court has made clear in a line of cases that such true private choice programs do not violate the Establishment Clause. In *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002), for example, this Court held that, when a government program is neutral toward religion and "provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice," the Establishment Clause is not violated. *Id.* at 652; see *id.* at 653 ("We have never found a program of true private choice to offend the Establish-

ment Clause."; recounting precedents). The Education Awards program, under which no public employee teaches any subject in a religious school and in which the federal educational award is for the sole use of the individual and never even indirectly, let alone directly, is paid over to the religious school, is a quintessential "true private choice program," *id.* at 653, and, if anything, has even less Establishment Clause implications than the tuition vouchers upheld in *Zelman*. See Pet. App. 7a, 9a-10a.

Petitioner further errs in arguing (Pet. 16-17) that a reasonable observer would perceive the Education Awards program as a governmental endorsement of the individual's religious activities. "[T]he reasonable observer in the endorsement inquiry must be deemed to be aware of the history and context underlying a challenged program." *Zelman*, 536 U.S. at 658 (internal quotation marks omitted). Here, because the individual teaches religious, as well as secular, subjects as an employee of the religious school, and not as an employee, contractor, or any other type of formal affiliate of the AmeriCorps program, there is no plausible basis for perceiving governmental endorsement of the religious message simply by virtue of the government's post hoc provision of a personal educational award for documented secular service to an individual who happens to have made a separate and independent choice to engage in religious instruction on her own time.

Indeed, the court of appeals' rejection of that same argument (Pet. App. 7a-8a) was a direct application of *Zelman*, in which this Court held that "no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of

private individuals, carries with it the *imprimatur* of government endorsement." 536 U.S. at 655. While petitioner is correct (Pet. 16-17) that participants rather than students choose where their qualifying public service will be performed, that is no different than *Zelman*, where the direction of tuition aid likewise turned upon the decisions of adults rather than the students, see 536 U.S. at 646. That intervention of private choice, moreover, stands in sharp contrast to *Ball*, where governmental aid ran to the schools directly and exclusively as a result of the decisions of government officials. 473 U.S. at 377.

Finally, petitioner's contention (Pet. 18) that *Zelman* does not apply because a governmental program can qualify as a program of true private choice only if it utilizes "fixed, mechanical criteria" is without merit. This Court has already upheld as neutral programs of true private choice government aid programs with selection criteria necessitating a degree of subjective judgment. See, *e.g.*, *Zelman*, 536 U.S. at 645 (qualifying schools cannot "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion"); *Mitchell*, 530 U.S. at 846 (O'Connor, J., concurring) (providing funds to local educational agencies for "'innovative assistance programs' designed to improve student achievement"); *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 483 n.2 (1986) (beneficiary must "reasonably be expected to benefit from vocational rehabilitation services in terms of employability").

Furthermore, nothing in the record establishes that the types of discretionary judgments permitted in identifying sponsors and programs are a facade for constitutionally proscribed discrimination. To the contrary, pe-

titioner "conceded at oral argument that there was no evidentiary support" for the proposition that "the Corporation had used its discretionary authority to favor religious organizations." Pet. App. 9a.[2]

2. Petitioner seeks (Pet. 17-18) this Court's review to resolve a purported "split of authority" between the decision below and the decisions of two other courts of appeals concerning whether a government program that employs discretionary selection criteria can qualify as a program of private choice for Establishment Clause purposes. There is no such conflict. In fact, the only other court of appeals' decision of which we are aware that directly addresses the issue has held—consistent with the court of appeals' decision here—that a true program

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[2] Petitioner complains (Pet. 19-20) that the court of appeals incorrectly placed the burden on it to show that the government was discriminating in favor of religion. But it is petitioner who, as the plaintiff, leveled a challenge to the constitutionality of federal law and to government officials' presumptively lawful administration of that law, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004); *Mitchell*, 530 U.S. at 863-864 (2000) (O'Connor, J., concurring), and it is thus petitioner who bears the burden of demonstrating that the program, facially or as applied, violates the Establishment Clause. See *Schaffer* v. *Weast*, 126 S. Ct. 528, 534 (2005). Moreover, the Corporation introduced substantial evidence showing that the overwhelming majority of program sponsors are secular, as are the vast majority of service opportunities. See Pet. App. 10a. Nothing in law or logic required the government at that juncture to go further and disprove petitioner's unsubstantiated allegations that, in practice, its facially neutral selection criteria are employed to favor religion. Petitioner's observation (Pet. 21) that the six current, religiously affiliated sponsors represent Christian denominations is not enough, for not even petitioner suggests that the Education Awards program reflects some sort of impermissible denominational preference. Indeed, there is no evidence that any otherwise qualified non-Christian organization applied unsuccessfully to be a program sponsor.

of private choice may permissibly use discretionary criteria that are neutral toward religion. See *Freedom From Religion Found., Inc.* v. *McCallum*, 324 F.3d 880, 881-884 (7th Cir. 2003).

Petitioner's own description of *Eulitt* v. *Maine Department of Education*, 386 F.3d 344 (1st Cir. 2004), as simply raising in a footnote a "question[]" (Pet. 18) about the use of discretionary criteria confesses the absence of any genuine conflict posed by that decision. Indeed, *Eulitt* addressed only an Equal Protection Clause challenge to a state statute that authorized public funding of tuition for private secular schools, but not for private religious schools. 386 F.3d at 346. The First Circuit noted, in the course of its decision, that Maine's tuition voucher program differed from *Zelman*, in part because the Maine program required an "individualized assessment of educational benefit." *Id.* at 349 & n.1. But the court did not suggest, let alone hold, that the existence of such discretion was dispositive, or that the Establishment Clause otherwise forbids the use of any criteria that require non-mechanical application.

Petitioner's reliance (Pet. 17-18) on *Stark* v. *St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), fares no better. In that case, the Eighth Circuit invalidated a program under which students at a state university earned school credit for teaching at any religious or secular school approved by the university. *Id.* at 1047. Relying on *Ball*, the Eighth Circuit held that, by permitting even indirect aid to religious schools, the program created a "symbolic link between the state and the church" and a "significant danger" that participants would, "intentionally or inadvertently, inject religious tenets into their teaching." *Id.* at 1051-1052.

This Court's decision in *Agostini* definitively rejected both of the grounds on which the 19-year-old *Stark* decision rests. See 521 U.S. at 223, 234. The Eighth Circuit has not applied *Stark*'s Establishment Clause analysis since *Agostini*, and this Court's intervening Establishment Clause precedents would foreclose doing so. See *Stark* v. *Independent Sch. Dist., No. 640*, 123 F.3d 1068 (8th Cir. 1997) (adhering to *Agostini*, and refusing to follow *Ball*, in case upholding the creation and operation of a public school that, while open to all students, also accommodated the needs of a particular religious group), cert. denied, 523 U.S. 1094 (1998).

3. Finally, petitioner seeks (Pet. 21-25) this Court's review of the court of appeals' ruling upholding the Corporation's practice of allowing religious sponsors to receive the identical $400-per-participant reimbursement for administrative expenses that the program affords to all other program sponsors. As the court of appeals recognized (Pet. App. 11a), in *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), this Court held that the government may allow religious entities to receive "direct cash reimbursement[s]" on the same terms as secular institutions for administrative expenses that they incur as a result of a secular governmental program. *Id.* at 657. There is no dispute that the Education Awards program imposes administrative requirements on program sponsors, such as "train[ing] participants, provid[ing] them with adequate supervision by qualified supervisors, keep[ing] various records, and mak[ing] regular reports to [the Corporation]." Pet. App. 11a. Furthermore, the court of appeals concluded (*id.* at 12a) that the $400 reimbursement allotted by the Corporation "is much less than the actual administrative costs" that sponsors incur for each individual participat-

ing in the Education Awards program, and petitioner presented no evidence to the contrary.

Instead, petitioner's principal argument is that such payments must be accompanied by "extensive reporting and auditing requirements" (Pet. 24). The court of appeals properly rejected that argument as "senseless" (Pet. App. 12a), given that the administrative costs actually incurred consistently exhaust the reimbursement amount, leaving nothing to be diverted. Given the small amount of money at issue (especially relative to the size of the administrative expenses it reimburses), and that access to that money depends upon the intervening and unfettered decisions of private individuals, the monthly interactions between AmeriCorps monitors and sponsors, as supplemented by annual inspections, see C.A. App. 754-757, are more than sufficient to eliminate any constitutionally cognizable risk that the money will be misused.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2005

DEC - 2 2005

No. 05-282

IN THE

Supreme Court of the United States

AMERICAN JEWISH CONGRESS,

Petitioner,

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, ET AL.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

1. Whether an AmeriCorps program under which individual participants choose service opportunities from an array of options selected under neutral criteria is properly analyzed under this Court's decision in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), rather than under *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985)?

2. Whether a government program involving "discretionary criteria" to select grantees is a neutral private choice program where there is no allegation or evidence that the "discretionary criteria" have been applied to favor religion and individuals choose from a wide range of approved grantees?

3. Whether auditing is necessary to ensure that funds provided to AmeriCorps grantees are restricted to secular purposes, where it is undisputed that the funds are "much less" than the grantees' secular administrative costs, the funds are restricted by statute and regulation to secular uses, and grantees are required to sign a specific assurance that these restrictions will be followed?

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JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). However, there are standing issues that threaten jurisdiction. *See infra* at 30.

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions identified by Petitioner, 45 C.F.R. § 2540.100(b) is also relevant, and is set forth in Appendix A.

STATEMENT

1. Factual Background

The University of Notre Dame's ("Notre Dame") Alliance for Catholic Education ("ACE") is a graduate education program that also meets the needs of underserved schools. ACE participants teach subjects including science, mathematics, foreign languages, English, social sciences, and religion in needy Catholic schools. Pet. App. at 3a. ACE does not require participants to teach religion, only that they be willing to provide instruction in a Catholic school. JA0887-88, 1105, 1113.

ACE participants receive a salary from the schools in which they teach. JA0888. In addition, the schools pay a fee to Notre Dame which is used to cover administrative costs and to purchase health insurance for ACE teachers. *Id.* The total cost of an ACE teacher to a parochial school approximates that of an entry-level teacher. *Id.*; JA1144.

ACE enjoys a unique association with the Corporation for National and Community Service ("CNCS" or "the Corporation") and the AmeriCorps program. The opportunities to participate in AmeriCorps are virtually limitless, with the government leaving others — including the States, nonprofit organizations, and universities — to define the essence of their service programs. Participants may choose from a broad array of initiatives; the statute only requires that a program respond to "pressing unmet human,

educational, environmental, and public safety needs." 42 U.S.C. § 12501(a)(1). The statute includes "a church or other religious entity" as one of several types of organizations eligible to craft a program with qualifying national service positions. *Id.* § 12511(5).

The AmeriCorps Education Awards Program ("AEAP") provides limited funding to participating programs, and is designed for grantees, like Notre Dame, who are able to provide significant funding other than that received through AmeriCorps. *See* 61 Fed. Reg. 46,628-29 (Sept. 4, 1996); JA0748-49. The process used by the Corporation in selecting programs for participation in AEAP is set forth in program guidelines, and involves consideration of three neutral criteria — Program Design, Organizational Capacity, and Budget / Cost Effectiveness, each of which encompasses neutral subcriteria. JA1555-56.

Programs participating in AEAP include several, such as ACE, in which participants serve by teaching in disadvantaged schools. For fiscal year 2001, thirteen of the seventy-seven AEAP grantees involved service by teaching. JA0759. These grantees placed teachers in approximately 1608 elementary and secondary schools, of which only 328, or 20%, were religious schools. *Id.*; Pet. App. at 10a.

The funding provided under AEAP consists of two components. Pet. App. at 3a. AmeriCorps participants earn an education award of $4,725 if they provide at least 1700 hours of secular service. *See* 42 U.S.C. § 12602(a)(1); 45 C.F.R. § 2527.10(a); Pet. App. at 3a. In addition, grantees such as Notre Dame are entitled to a modest grant to assist in defraying the administrative costs of the program. In 2001-2002, ACE received $400 per participant in such grants, which represents less than 3% of ACE's annual budget. Pet. App. at 3a; JA0889.

Both types of AEAP funding come with detailed restrictions on their availability and use. Federal statutes and regulations and AmeriCorps grant provisions and guidelines

prohibit ACE teachers from earning AmeriCorps credit for any hours spent providing religious instruction or engaging in religious activities. 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b); Pet. App. at 7a; JA1490.[1] Similarly, grantees are prohibited from using any portion of an administrative grant "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). Accordingly, Notre Dame deposits funds received from the government in a restricted account and uses them only to offset secular program costs. Pet. App. at 34a.

However, the regulatory scheme takes care not to restrict private conduct unnecessarily. AEAP participants, grant provisions instruct, "may exercise their rights as private citizens" to participate in activities including "[e]ngaging in religious instruction, conducting worship services, or engaging in any form of religious proselytization," "on their initiative, on non-AmeriCorps time, and using non-Corporation funds." JA1490; Pet. App. at 7a. However, "[t]he AmeriCorps logo should not be worn while doing so." JA1490; Pet. App. at 7a.

The Corporation ensures that these rules are followed. JA0751-58, 0891-92. Grant applications must specify the applicant's plans for ensuring compliance with funding restrictions, and applicants must execute a specific assurance that they will comply with all rules regarding prohibited activities. JA0752-53, 0866, 0869. CNCS also requires grantee staff and participants to attend training on the rules

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[1] Petitioner erroneously cites 45 C.F.R. § 2520.30 as providing the relevant limitation on the activities of AmeriCorps participants. Pet. at 1, 2, 7 n.2, 9. But, as explained in the courts below by both the Corporation and Notre Dame, that provision applies only to AmeriCorps programs under Subtitle C of Title I of the National and Community Service Act. *See* 45 C.F.R. § 2520.30. AEAP programs are carried out under Subtitle H. JA0748.

regarding prohibited activities. JA0753, 0758, 1493. Grantees must review participants' timesheets to ensure that no time spent in religious activity is included. JA0892, 1505, 1544. Upon completing a term of service, participants must sign an Exit Form stating the number of AmeriCorps service hours performed, with the understanding that a willful false statement is punishable by a fine and/or imprisonment. JA0754, 0871-72. Every participant who serves in a religious school must sign an additional certification that the service hours reported on the Exit Form do not "include any religious instruction, worship, or proselytization." JA0754, 0874. CNCS personnel also conduct site visits to review time logs and interview participants and supervisors. JA0095-0100, 0755-56. Each grantee is required to submit to the Corporation an annual report following up on any compliance issues. JA0757.

Notre Dame also ensures compliance with AmeriCorps rules. JA0710-16, 0891-92, 0894-0939, 1094, 1098-1100, 1149, 1151-52, 1453. Through orientation sessions and written materials, Notre Dame describes and explains the prohibitions on religious activity to ACE participants and host schools. JA0710-11, 0891, 0896-98, 0906-39, 1099-1100, 1149, 1152, 1453. In addition, Notre Dame personnel visit sites where participants are serving to monitor compliance, JA0891-92, 1453, and require participants to complete time logs that emphasize that religious activity may not be included. JA0892, 0939, 1099.

2. Procedural Background

Petitioner filed this action against the Corporation on October 3, 2002, advancing a single count under the Establishment Clause. Petitioner sought a declaration and conforming injunction that the Establishment Clause forbade the Corporation "to approve or qualify the ACE Program, CNVS Program . . . and any other similar AmeriCorps program," or to provide funding to those programs or their

participants, if those participants, outside the scope of their secular AmeriCorps service hours, also provided religious instruction. JA0029 (Complaint, Prayer for Relief). Notre Dame intervened as a defendant. Following discovery, the District Court granted petitioner's motion for summary judgment and denied Notre Dame's and the Corporation's cross-motions for summary judgment. Pet. App. at 13a. The District Court entered an injunction, Pet. App. at 56a, which it later stayed pending appeal. JA0083.

The D.C. Circuit unanimously reversed the District Court, finding that the AEAP's provision of education awards to AmeriCorps participants for secular service was, like the school vouchers program upheld in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), a neutral program involving "genuine independent choice." Pet. App. at 9a. The D.C. Circuit also held that the fixed administrative grants provided to program sponsors such as Notre Dame were constitutional because they reimbursed sponsors for a portion of the secular administrative costs imposed on them by AmeriCorps requirements. Pet. App. at 11a-12a. Following the D.C. Circuit's unanimous opinion, petitioner filed a petition for rehearing *en banc*, which was denied without a single member of that court even calling for a vote. Pet. App. at 59a-60a.

REASONS FOR DENYING THE PETITION

The unanimous decision of the D.C. Circuit in this case involves a routine application of this Court's Establishment Clause precedents applicable to neutral private choice programs. According to petitioner, simply allowing individuals who provide secular service in a religious school to participate on equal footing with other AmeriCorps participants results in a governmental indoctrination of religion. This is so, petitioner claims, even though any participant who provides AmeriCorps service in a religious school has voluntarily chosen to do so from among a vast array of predominantly secular program options, and even

though no federal money is provided to either the AmeriCorps participants for any time spent in religious activity or to the religious schools at which they teach.

Petitioner's claims are irreconcilable with this Court's Establishment Clause jurisprudence and present no certworthy issue. Petitioner claims that the unanimous D.C. Circuit "usurped" this Court's authority when it concluded that *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), did not render the challenged program unconstitutional. But far from "overstep[ping] its bounds," Pet. at 2, the D.C. Circuit simply recognized that *Ball*'s core reasoning was rejected by *this* Court in *Agostini v. Felton*, 521 U.S. 203 (1997), and concluded that "the Supreme Court's more recent decisions upholding programs of true private choice, particularly *Zelman* . . . control this case."

Nor does petitioner's emphasis on the "discretionary" criteria for choosing AEAP grantees render this case certworthy. As the Court of Appeals recognized, the relevant question is not whether funding processes are "discretionary" but whether they are *neutral*. Only if facially neutral discretionary criteria are used to subtly favor religion (which petitioner did not allege here) is there constitutional concern. Petitioner's claim of a circuit split on this issue is unfounded, identifying only a 1986 case decided without this Court's recent guidance and footnote *dicta* in a case that did not decide an Establishment Clause issue.

Petitioner's attack on the modest $400-per-participant funding to AEAP grantees to recoup a portion of their administrative expenses is no more deserving of the Court's attention. Petitioner argues that while the statute forbids use of these funds for religious purposes, there are inadequate mechanisms to ensure that the restriction is followed. It is undisputed, however, that the amount of funding here is "much less" than the actual secular administrative costs grantees incur per participant. Further, there *are* significant mechanisms for restricting the use of these funds, including

the statutory prohibition and a requirement that grantees sign a specific assurance that the funds will not be used for religious activities. Finally, this case is an inherently flawed vehicle to resolve the extent of secular use restrictions needed to "safeguard" *actual* direct aid because these administrative grants flow from, and are intertwined with, the individual choices of AmeriCorps participants. In short, petitioner's argument on this issue represents a factbound challenge to the D.C. Circuit's application of existing law, on which petitioner alleges no circuit split.

I. THE DECISION BELOW IS A ROUTINE APPLICATION OF THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

A. Neutral Private Choice Programs Satisfy The Establishment Clause.

As this Court held in *Zelman v. Simmons-Harris*, "programs of true private choice," if neutral as to religion, do not have the "effect" of advancing religion because any religious indoctrination that might occur is not reasonably attributable to governmental action. 536 U.S. at 649. In *Zelman*, this Court upheld Ohio's tuition assistance program, which enabled qualifying families to use public funds to send children to participating schools. *Id.* Almost all recipients of this aid — 96% — enrolled in religious schools. *Id.* at 647. Nonetheless, because funds reached religious schools only through "genuine and independent private choice" within a neutral program, any religious indoctrination was not attributable to the government. This was so even though the vouchers would pay "for eligible students' instruction not only in secular subjects but in religion as well, in schools that can fairly be characterized as founded to teach religious doctrine and to imbue teaching in all subjects with a religious dimension." *Id.* at 687 (Souter, J., dissenting).

Zelman did not "mark[] a dramatic break" from this Court's "prior Establishment Clause jurisprudence." *Id.* at 663 (O'Connor, J., concurring). In *Zobrest v. Catalina*

Foothills School District, 509 U.S. 1, 10 (1993), this Court held that a State's provision of a sign interpreter to a deaf student attending a Catholic high school did not offend the Establishment Clause: "When the government offers a neutral service on the premises of a sectarian school as part of a general program that is in no way skewed towards religion, it follows under our prior decisions that provision of that service does not offend the Establishment Clause." *Id.* (internal quotation marks and citation omitted); *see also Witters v. Wash. Dep't of Servs. for Blind*, 474 U.S. 481, 488 (1986) (upholding vocational assistance to blind student desiring pastoral training because "[a]ny aid . . . that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients"); *Mueller v. Allen*, 463 U.S. 388, 399-400 (1983) (upholding tax deductions for tuition and expenses incurred by parents at secular and religious schools, reasoning that religious schools benefited "only as a result of numerous, private choices of individual parents" to enroll their children). Recently, citing these precedents, this Court found "no doubt" that the government could constitutionally include in a scholarship program students choosing to pursue even a degree in devotional theology. *Locke v. Davey*, 540 U.S. 712, 719 (2004). This Court unanimously recognized that under *Zelman* and its predecessors, "the link between government funds and religious training is broken by the independent and private choice of recipients." *Id.*; *see also id.* at 728-29 (Scalia, J., dissenting).

In a related line of cases, this Court has upheld neutral programs in which funding or in-kind aid is provided *directly* to religious schools, if restricted to secular uses. In *Agostini v. Felton*, 521 U.S. 203 (1997), for example, the Court sustained parochial school participation in the Title I program, explaining that funding does not offend the Establishment Clause "where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular

beneficiaries on a nondiscriminatory basis." *Id.* at 231. The Court reached a similar conclusion in *Mitchell v. Helms*, 530 U.S. 793 (2000), upholding a neutral program providing computers and other teaching aids to parochial schools.

Together, these two lines of cases demonstrate that, where religious organizations and individuals participate in a government program on an equal footing, there is no basis to infer, as petitioners properly frame the question, that religious indoctrination is "reasonably attributable" to the government. Pet. at 20 (citing *Mitchell*, 530 U.S. at 809). Moreover, the only time aid must even arguably be restricted to secular uses is where there is a direct provision of aid to a religious organization. Neutral benefits may be used even for core religious purposes if their direction to religious organizations is made by the unfettered choice of private individuals.

B. AEAP's Provision Of Education Awards To Participants Serving In Religious Schools Meets The Commands Of The Establishment Clause.

As established above, a neutral governmental aid program satisfies the Establishment Clause if the program *either* functions on the basis of private choice *or* involves secular use restrictions. The D.C. Circuit's analysis of the AEAP's provision of Education Awards to participants serving in religious schools clearly comports with these principles: the AEAP is manifestly neutral, distributes aid on the basis of private choice *and* rewards only secular activities.

The D.C. Circuit was correct in recognizing that both individual AEAP participants and AEAP grantees "are, and must be, chosen without regard to religion." Pet. App. at 7a. It is undisputed that the criteria for individual AmeriCorps participants to receive the award — 1700 annual hours of approved secular service, a high school diploma, a minimum age of 17, and U.S. citizenship or residency, *see* 42 U.S.C. § 12602 — are secular, neutral and objective. Indeed, the

statute expressly forbids consideration of religion in the selection of participants. *See id.* § 12635(c).

AEAP grantees, too, are selected based on manifestly secular criteria — Program Design, Organizational Capacity, and Budget/Cost Effectiveness. JA1555-56.[2] Petitioner thus repeatedly conceded below that "the Corporation's grant selection criteria are neutral." *See, e.g.*, Dist. Ct. Docket No. 42 (Petitioner's Motion for Summary Judgment at 42 n.6). As the D.C. Circuit saliently noted, "[petitioner] did not allege that the Corporation had . . . favor[ed] religious organizations, and it conceded at oral argument that there was no evidentiary support for such an allegation." Pet. App. at 9a.

Nor would the facts allow any claim of favoritism. In stark contrast to *Zelman*, the vast majority of grantees are secular; fewer than *11%* of AEAP participants served under the sponsorship of faith-based organizations in 2001.[3] *Cf. Zelman*, 536 U.S. at 655-68 (no endorsement even though 96% of participating students enrolled in religious schools). Moreover, the Corporation approves the vast majority of AEAP grantee applicants (85% from 1999 to 2002), leaving little leeway for "favoritism" of any kind. JA0750, 1480. Given these facts, the D.C. Circuit sensibly concluded that "the program is neutral." Pet. App. at 9a.

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[2] Petitioner now quotes selectively from the grantee selection criteria, emphasizing one subfactor which considers whether a prospective grantee has "[s]trong community partnerships, including well-defined roles for faith- or community-based organizations." Pet. at 3-4. Petitioner does not actually appear to claim that this criteria impermissibly favors religion, nor could it. *See Bowen v. Kendrick*, 487 U.S. 589, 604, 607 (1988) (upholding statute as neutral although grantees required to describe how they would involve religious organizations).

[3] JA1582. If the universe is narrowed to AEAP participants who serve as teachers, only 18% of the 3200 teaching participants in 2001 served in religious schools. JA0759.

Likewise, the D.C. Circuit found the AEAP a program of true private choice, reasoning that "[t]he relevant question is whether participants seeking to earn an Educational Award possess a genuine independent choice between religious and non-religious organizations in which to perform their national service." *Id.* The undisputed facts plainly establish that such a choice does exist. An individual interested in participating in AmeriCorps has a large variety of service options available to him, the vast majority of which are entirely secular in nature. For example, in fiscal year 2001, there were 77 grantees providing service opportunities through the AEAP, with an even larger number of options available through other AmeriCorps programs. JA0759. Only 328 of the approximately 1608 schools employing AmeriCorps participants as teachers in 2001 were religious schools. Pet. App. at 10a. Moreover, as the D.C. Circuit recognized, "there is no evidence of any participant who wanted to teach in a secular school, but was impermissibly channeled to a religious school." Pet. App. at 9a. Thus, because "enough non-religious options exist, those participants who choose to teach in religious schools do so only as a result of their own genuine and private choice." Pet. App. at 10a. Indeed, participants in the AEAP have, if anything, a far *more* "genuine" choice than students in the Cleveland voucher program seeking to leave a failing public school system. The Court in *Zelman* found that Ohio students had a genuine choice even though 82% of participating schools were religious, and 96% of scholarship participants enrolled in religious schools, compared to the 11% here. 536 U.S. at 658-60; *see also Mueller*, 463 U.S. at 401 (upholding program although 96% of tax deductions claimed were for children in private school).

While the neutrality and private choice that characterize the AEAP would establish the program's constitutionality even if funds were available for religious uses, *see Zelman*, 536 U.S. at 657-59, AEAP funds are in fact strictly limited to secular purposes. The statute forbids any Corporation funds,

including education awards and administrative grants, from being used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a); 45 C.F.R. § 2540.100(b). In addition, the 1700 annual hours of service credit required for an education award can only be earned through secular service. *See id.*; Pet. App. at 7a. This statutory and administrative scheme, strictly limiting AEAP funds to secular purposes, parallels those upheld in *Agostini* and *Mitchell*. *See Mitchell*, 530 U.S. at 849 (O'Connor, J., concurring in the judgment) (statute prohibited "the making of any payment . . . for religious worship or instruction") (internal quotation marks omitted; ellipsis in original); *Agostini*, 521 U.S. at 210 (Title I services must be "secular, neutral, and nonideological") (internal quotation marks omitted).

Finally, no government funds ever reach the schools at which AEAP participants teach. In fact, the flow of funds is in the opposite direction, as the schools pay participants for the services they provide, and the cost to schools of hiring AmeriCorps teachers is approximately equal to the salary the schools pay their other new teachers. JA0888. This is thus a far easier case than *Mitchell* or *Zelman*, where it was undeniable that religious schools received a tangible financial benefit because they received aid either from the government, *Mitchell*, 530 U.S. at 802, or from students who transferred the government's earmarked funds to religious schools for tuition, *Zelman*, 536 U.S. at 645-48. *Cf. Zobrest*, 509 U.S. at 10 (finding case "easier" than earlier decisions because "no funds traceable to the government ever find their way into sectarian schools' coffers").

In these circumstances, the Court of Appeals ruling was not only correct; a contrary holding would have run afoul of AEAP grantees' and participants' Free Exercise and Free Speech rights. Petitioner's position would require CNCS to cease all funding to otherwise qualifying AEAP participants solely because they choose — without public support — to engage in religious activity on their own time. This result

would require the government to single out for disparate treatment institutions with religious missions and persons who choose to put their faith into action through community service. Petitioner's position would thus require the government to affirmatively discriminate against religion in violation of the First Amendment. *See Zelman*, 536 U.S. at 649 (First Amendment forbids laws either "advancing or inhibiting" religion); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542 (1993) (Free Exercise Clause "protects religious observers against unequal treatment") (internal quotation marks and brackets omitted); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947) ("State power is no more to be used so as to handicap religions, than it is to favor them.").

C. A Reasonable Observer Would Not Believe That The AEAP Is Endorsing Religion.

Despite the neutrality and private choice inherent in the AEAP, petitioner claims that the program results in government indoctrination because "the young elementary and secondary parochial school students" are "not privy" to any "private choice" of their teachers in choosing an AmeriCorps program. Pet. at 16. But as this Court has repeatedly made clear, the program must be considered from the perspective of an "objective observer" "familiar with the full history and context" of the program — not the perspective of schoolchildren. *See, e.g., Zelman*, 536 U.S. at 655; *Capitol Sq. Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779 (1995) (O'Connor, J., concurring in part) ("the endorsement inquiry is not about the perceptions of particular individuals.").[4]

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[4] Petitioner's reliance on *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 308 (2000), Pet. at 17, is plainly misplaced. While the Court began with an inquiry into what the audience would perceive, it immediately turned to whether the "text and history" of the challenged policy would accord with that perception, concluding that not only the

An informed observer would be aware that no religious activity counts toward AmeriCorps service hours, and that AEAP participants serving in religious schools have chosen that service from a host of options. Thus, the D.C. Circuit was correct in holding that "no 'objective observer familiar with the full history and context' of the program would believe that the aid flowing to the religious institution carries with it 'the *imprimatur* of government endorsement.'" Pet. App. at 7a (quoting *Zelman*, 536 U.S. at 655) (emphasis in original). Petitioner's argument that the D.C. Circuit erred in its application of that standard identifies no circuit split, and presents at most a factbound challenge to the Court of Appeals' application of existing law.

II. *BALL* PROVIDES NO SUPPORT FOR GRANTING THE PETITION

Petitioner argues that the Court of Appeals "cast aside this Court's governing decision" in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), and thus ignored this Court's instruction in *Agostini*, 521 U.S. at 237, that Courts of Appeal should not declare precedent of this Court to have been overruled by implication. Pet. at 13. But the court below did not "choose" to "disregard" binding precedent because it determined for itself that the precedent had been eroded. Rather, it simply recognized that there was nothing left of *Ball* to "follow": The specific holding in *Ball* that arguably survived subsequent cases was concededly inapposite and *Ball's* broader doctrinal principles could not be "extended" to this case since all those principles had been *expressly* rejected by *this* Court. In short, the situation here involves nothing remotely comparable to the "implicit overruling" at issue in *Agostini* for two fundamental reasons:

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students' perception but also the policy's text and history led to a conclusion that prayer was "in actuality, encouraged by the school." 530 U.S. at 308.

(1) *Ball*'s central reasoning has already been *expressly* rejected by this Court, and (2) unlike in *Agostini*, which involved the precise program that this Court had previously addressed in *Aguilar v. Felton*, 473 U.S. 402 (1985), the AEAP program at issue here is fundamentally different than the Community Education program at issue in *Ball*.

Ball invalidated two programs: the "Shared Time" program, in which public school employees taught courses in parochial schools; and the "Community Education" program, in which religious school teachers taught supplemental secular courses in religious schools with public funding. 473 U.S. at 377. In *Agostini*, which involved public school employees on parochial school grounds, the Court expressly overruled the part of *Ball* that invalidated the "Shared Time" program, but had no occasion to specifically address *Ball*'s holding regarding the "Community Education" program.

The Court did, however, explicitly reject the core doctrinal "premises upon which [it] relied in *Ball*. . . ." *Agostini*, 521 U.S. at 226 — premises that underlay both *Ball*'s "Shared Time" and "Community Education" holdings. Thus, *Agostini* "abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion." *Id.* at 223. *Agostini* also "departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid," *id.* at 225, "even if the aid reaches such schools as a consequence of private decisionmaking," *id.* at 222.

Mitchell, too, rejected *Ball*'s willingness to "presume" religious indoctrination. Thus, while *Ball* presumed that the pressures of the religious school environment would lead to an unacceptable risk that publicly funded teachers would inculcate religion even during supposedly secular instruction,

473 U.S. at 387, *Mitchell* refused to presume that religious school teachers would use secular educational materials provided by the government for religious instruction — notwithstanding a number of examples where such actual diversion occurred. 530 U.S. at 823-24 (plurality); *id.* at 857-58 (O'Connor, J., concurring in the judgment).

Because this Court has rejected the logical underpinnings of *Ball*, lower courts are not authorized, much less obligated, to apply that logic to other programs. Even if *Ball*'s holding regarding the Community Education program itself continues to be binding, there is no surviving principle to apply in other contexts. *Cf. Agostini*, 521 U.S. at 237 (cautioning that if a Supreme Court precedent had "*direct application*," lower courts should "follow the case which *directly controls*") (emphasis added; internal quotation marks omitted). It is thus unsurprising that not only the unanimous D.C. Circuit, but even the District Court, rejected petitioners' reliance on *Ball*. Pet. App. at 6a; 39a n.11.

Reliance on whatever is left of *Ball* would in any event be entirely inappropriate given the fundamental differences in the Community Education program and the AEAP. Any benefit to religious schools from the AEAP comes only as a result of individual choices by AEAP participants to provide service in a religious school from an array of service opportunities. The Community Education program, in contrast, involved a government-created curricula taught by religious school teachers paid exclusively by the government for their teaching duties in those courses. 473 U.S. at 376-79. The program was clearly not neutral, because, as petitioner's law firm cogently explained in *Mitchell*, "the state gave hiring preferences to religious school teachers, which violates the dictates of neutrality." *Reply Brief* of Petitioners in *Mitchell*, 1999 WL 1016734, at *11 n.8 (Nov. 3, 1999); *Ball*, 473 U.S. at 377. Further, of the 41 schools where the Community Education program operated, 40 were identifiably religious schools. *Ball*, 473 U.S. at 377. *Ball* thus held that the Community Education program constituted

direct aid "indistinguishable from the provision of a direct cash subsidy to the religious school." *Id.* at 395; *see also Zobrest*, 509 U.S. at 12 (*Ball* involved "direct grants of government aid").[5]

Petitioner itself apparently recognizes that the analogy between the AEAP and the Community Education program proves too much. *Ball* held that the Community Education faculty could not teach *secular* courses in parochial schools, but petitioner has not argued that the Establishment Clause prevents AEAP participants from teaching secular courses in religious schools. Dist. Ct. Docket No. 62 (Plaintiff's Proposed Order, at 1-2); Petitioner's Appellate Brief, at 2. As this reflects, petitioner's procrustean effort to squeeze the remnants of *Ball* into this case produces an absurd and inconsistent rule. That is, post-*Agostini*, it is clear that full-time *public employees*, like the public school teachers in the Shared Time program and in *Agostini*, can teach at religious schools without violating the Establishment Clause. If *Ball*, as modified by *Agostini*, truly does provide relevant guidance here, this necessarily means that the government would be in a *better* position if it used full-time public school teachers, instead of AmeriCorps participants employed by the religious schools, to conduct the religious instruction challenged here. This, of course, makes no sense and is completely at odds with petitioner's premise that AmeriCorps participants are analogous to public employees

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[5] The same is true of the "salary supplement" in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which Petitioner attempts to analogize. Pet. at 16. Unlike the AEAP program, which rewards a wide variety of secular service in programs chosen by individuals, the "salary supplement" struck down there was targeted specifically to increasing the salaries of teachers at private schools, and Roman Catholic schools were the sole beneficiaries of the legislation. *See* 403 U.S. at 615. Moreover, the program was struck down as producing an "excessive entanglement" of church and state, a ground Petitioner does not press here. *Id.* at 619-20.

and, for that reason, *cannot* engage in religious instruction on their own time.

In the end, *Ball* offers no grounds whatever for granting review here. Neither of the courts below expressed any uncertainty or need for guidance from this Court regarding *Ball*'s application, nor has petitioner identified any other court that has done so. Moreover, this case would not be an appropriate vehicle for addressing the continuing vitality of *Ball* — indeed, given the fundamental differences in this program and the Community Education program in *Ball*, this case would present no occasion for the Court to revisit the continuing force of *Ball*'s Community Education holding. Despite petitioner's efforts to cast *Ball* as key, as the D.C. Circuit unanimously recognized, it is in fact the Court's decisions upholding neutral programs of true private choice that "control this case." Pet. App. at 6a-7a.

III. REVIEW IS UNWARRANTED TO ADDRESS THE SIGNIFICANCE OF DISCRETION IN GOVERNMENT AID PROGRAMS

Petitioner urges this Court to grant certiorari to "clarify" whether government grant programs involving discretionary criteria "can be considered programs of 'private choice.'" Pet. at 17. But petitioner has not demonstrated any need for "clarification" of this issue — it simply disagrees with the Court of Appeals' treatment of it. In fact, the D.C. Circuit's unanimous conclusion that such discretion was not constitutionally problematic absent evidence that it had been used to favor religious organizations is mandated by this Court's precedents. Moreover, petitioner's claim of a circuit split on the issue is unfounded.

A. The Decision Below Is Consistent With This Court's Precedents.

Far from "conflict[ing] with this Court's precedent," Pet. at 18, the Court of Appeals' decision on this point is in fact entirely consistent with and compelled by that precedent. Every government program subject to fiscal sanity "restricts"

where the public money may go, and the selection criteria typically involve substantial government discretion. In the voucher program upheld in *Zelman*, for example, Ohio Revised Code § 3313.976(A)(3) required that to participate in the voucher program, a private school must "meet[] all state minimum standards for chartered nonpublic schools . . . except that the state superintendent *at the superintendent's discretion* may register nonchartered nonpublic schools meeting the other requirements of this division." (emphasis added). Even apart from this manifestly discretionary exception to the usual "state minimum standards," those "minimum standards" themselves were full of discretionary criteria.[6]

As the Court of Appeals recognized, Pet. App. at 8a, the same principle is illustrated by *Bowen*, 487 U.S. at 589. The award of grants there was highly discretionary — for example, funded projects were required to "'use such methods as will strengthen the capacity of families to deal with the sexual behavior, pregnancy, or parenthood of adolescents . . .'" *Id.* at 596 (quoting 42 U.S.C. § 300z-2). It was also highly competitive — HHS received 1,088 grant applications and awarded only 141 grants, including some to "organizations with institutional ties to religious denominations." *Id.* at 597. The Court nonetheless rejected an Establishment Clause challenge, as there was no suggestion that the Act was "anything but neutral with respect to the grantee's status as a sectarian or purely secular institution." *Id.* at 608; *see also, e.g., Witters*, 474 U.S. at 483 (assistance for the blind to help "obtain the maximum degree of self support and self care," and limited to

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[6] *See, e.g.*, Ohio Admin. Code § 3301-35-06(A) ("Educational programs and experiences shall be designed and implemented to provide a general education of high quality for all students."); *id.* § 3301-35-05(B) ("The district or school shall maintain an environment that supports personal and organizational performance excellence.").

accredited schools) (internal quotation marks omitted); *Mitchell*, 530 U.S. at 803 (to receive materials, private school had to submit application "detailing which items the school seeks and how it will use them," which application could be disapproved by public agency).

Avoiding these examples of clearly constitutional yet discretionary programs, petitioner quotes the *Mitchell* plurality for the truism that "'if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria,'" then the danger of religious favoritism is diminished. Pet. at 19 (quoting *Mitchell*, 530 U.S. at 810). But here "numerous private choices" *do* "determine the distribution of aid pursuant to neutral eligibility criteria." Petitioner apparently believes that the private choice of AEAP participants is somehow invalidated because that choice is limited to "select" grantee programs approved by the government. Pet. at 19. But what is required is that private choice be "genuine," not that it be "universal."[7] As noted, *all* of the aid programs upheld by this Court limited the use of public money to those eligible participants selected by the government.

Nor is there any basis for petitioner's apparent view that "subjective" criteria are necessarily more manipulable than "fixed, mechanical criteria." Pet. at 18, 20. In *Zelman*, for example, four dissenting Justices argued that the program there had been subtly skewed by imposition of an "objective" $2,500 cap on tuition that would tend to favor religious schools due to their lower average cost. 536 U.S. at 705 (Souter, J., dissenting). The question is not whether a

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[7] It also bears noting that while service with approved grantee programs has been the prevailing practice, the governing statute specifically contemplates that education awards can be awarded for individual service in any program that would satisfy statutory requirements, even if it has not applied for an AmeriCorps grant. 42 U.S.C. § 12573.

government aid program's criteria are "subjective" or "objective," but whether they favor religion. Indeed, under petitioner's radical invalidation of all programs containing "discretion," no state university could award a scholarship to a religious studies student on the basis of discretionary criteria such as "academic excellence" and religious grantees would be entirely foreclosed from a host of grant programs.

Petitioner argues that the Court of Appeals placed on it "a burden that is unprecedented in Establishment Clause jurisprudence" to "show the government was intentionally discriminating in favor of religious groups." Pet. at 19-20. But, as the decision below recognizes, federal courts cannot simply enjoin presumptively constitutional federal programs on the mere *possibility* that discretionary criteria could be employed to favor religious organizations. Just as it is impermissible to "presume" that public employees teaching on religious school grounds will depart from the program's secular requirements, *see Agostini*, 521 U.S. at 223-24, a court cannot presume that the Corporation's employees will violate their statutory duties and skew the AEAP towards religious grantees. *See Mitchell*, 530 U.S. at 858 (O'Connor, J., concurring in the judgment) (explaining the "broad[] proposition that . . . presumptions of religious indoctrination are normally inappropriate when evaluating neutral school aid programs under the Establishment Clause"); *Agostini*, 521 U.S. at 229 (criticizing the dissent's reliance on "speculation . . . and not on any evidence in the record"); *cf. National Endowment for Arts v. Finley*, 524 U.S. 569, 587 (1998) (challenge to discretionary funding program as involving viewpoint discrimination rejected absent any allegation of discrimination in a particular funding decision).

Petitioner argues that the remand in *Bowen* indicates that the Court is "concerned about . . . using government funds to indoctrinate religion" even "when neutral criteria are used to select beneficiaries." Pet. at 20. That may well be true, but it lends no support to petitioner's altogether different contentions that *discretionary selection* programs are not

neutral and that the *government* has the *burden* of establishing the neutrality of such programs. Indeed, even with respect to the entirely separate question of whether the neutrally-selected grantee uses the public funds for religious purposes, the *Bowen* remand was for "consideration of the evidence presented by *appellees*" — the parties challenging the funding. 487 U.S. at 621 (emphasis added). Thus to the extent that this aspect of *Bowen* has any relevance, it supports the fundamental proposition that a party raising an Establishment Clause challenge has the burden of proving it, and is thus perfectly consistent with the Court's later decision in *Mitchell* that, where a statute is facially neutral, those challenging a government aid program "must prove" actual diversion of government aid. *See* 530 U.S. at 857 (O'Connor, J., concurring).

In any event, the "burden" issue is a red herring because petitioner did not even *allege* religious favoritism in the grantee selection process, and *conceded* that there was "no evidentiary support for such an allegation." Pet. App. at 9a.[8]

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[8] Petitioner now observes that the six faith-based AEAP grantees in 2004 all happen to be affiliated with Christian faiths, Pet. at 21, but there is no evidence that any programs affiliated with non-Christian faiths even applied for participation, or any *claim* that the Corporation discriminated *among* religions. Petitioner also neglects to consider non-Christian religious organizations in other AmeriCorps programs. Moreover, at least one host site served by a grantee is a non-Christian religious school. *See* Dist. Ct. Docket No. 78, Ex. 2 (AmeriCorps participant taught secular subjects at an Islamic school). In any event, the question is not whether every religion is represented under the AEAP but, instead, whether participants have a genuine choice between secular and religious grantees with which to serve. *Cf. Zelman*, 536 U.S. at 658 ("The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school.").

B. There Is No Circuit Split.

In a futile attempt to demonstrate a circuit split, petitioner cites decisions from the Eighth and First Circuits. The former, a decision from 1986, relied on outmoded reasoning and is inapposite on the crucial facts, while the latter did not even purport to resolve an Establishment Clause challenge. Tellingly, petitioner did not, in its D.C. Circuit briefing, see fit to even cite these cases, which were mentioned only by an amicus brief.

In *Stark v. St. Cloud State University*, 802 F.2d 1046 (8th Cir. 1986), the court held that a public university could not allow students to fulfill their student teaching requirements by teaching secular subjects at religious schools. The court did not consider or discuss the significance of government "discretion." Instead, relying on *Ball*, the court reasoned that the provision of even indirect aid to religious schools did not "neutralize the symbolic link between the state and the church" and noted "[a] significant danger . . . that the University students will, intentionally or inadvertently, inject religious tenets into their teaching." *Id.* at 1051-52. Yet, subsequent to *St. Cloud*, *Agostini* explicitly rejected these "premises" upon which *Ball* and *St. Cloud* rested. *See supra* at 15. As such, as the North Dakota Attorney General has noted, *Stark* is a "mere survivor of obsolete constitutional thinking." Formal Op. 2002-F-05, 2002 WL 562573, at *8 (N.D.A.G. March 8, 2002) (internal quotation marks omitted).[9]

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[9] Even if such reasoning had not been declared "invalid" by *Agostini*, 521 U.S. at 226, the *Stark* decision rested on facts readily distinguishable from those here. St. Cloud University not only approved teaching sites, it "exercise[d] the power of final approval over every student placement," 802 F.2d at 1051. Moreover, by enlisting parochial schools in a public university's own teacher training, the program there made parochial schools "repositories of state trust," *id.*, quite unlike the much more attenuated relationship of parochial schools to the AEAP. Further, use of

Petitioner's citation to *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344 (1st Cir. 2004), is even more misplaced. That case did not purport to resolve an Establishment Clause issue, simply calling it "fairly debatable" whether public tuition for selected students attending private schools is permissible where the program was "substantially narrower" than in *Zelman* and depended on an "individualized assessment" of the appropriate pupil placement, *id.* at 349 n.1, features with no parallel here. Thus, even assuming *Eulitt* suggests that the role of discretionary criteria is "debatable," that debate has not yet occurred in the lower courts.

Indeed, the only other Circuit decision to meaningfully discuss the role of "discretion" in assessing compliance with the Establishment Clause is squarely in agreement with the decision below. In *Freedom from Religion Foundation, Inc. v. McCallum*, 324 F.3d 880 (7th Cir. 2003), a taxpayer sought to enjoin correction authorities from including a religiously-oriented halfway house among the options for parolees, where parole officers could and did recommend specific facilities. The Seventh Circuit unanimously upheld the program, finding it analogous to *Zelman*. Although parole officers' recommendations of a halfway house rested on discretionary judgments, the Seventh Circuit emphasized that the trial court had not found actual religious favoritism, and that striking down the funding without such a showing would lead to a "perverse . . . result" because it would "sacrifice . . . a real good to avoid a conjectured bad." *Id.* at 884. Contrary to petitioner's claim, this "perverse result"

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the parochial schools as teaching sites triggered payments from the University to those schools, with "no limitations on the schools' use of this money." *Id.* at 1048. In contrast, the religious schools here receive no funding from the government and AmeriCorps participants only serve at those schools after choosing from among a wide array of secular and religious options.

has not been embraced by any Circuit, and this Court's review is unwarranted.

IV. THE COURT OF APPEALS' DECISION UPHOLDING THE MODEST ADMINISTRATIVE GRANTS DOES NOT WARRANT REVIEW

There is no merit to petitioner's contention that the D.C. Circuit improperly applied this Court's precedent concerning reimbursement to religious groups for the costs of administering a government sponsored program. The D.C. Circuit's unanimous decision on this issue is a proper application of this Court's precedents, and petitioner alleges no circuit split. The question does not merit review.

The Court has upheld numerous programs where aid is provided on a neutral basis to religious institutions and statutory and administrative restrictions require that the funds be used only for secular activities. *See, e.g., Mitchell*, 530 U.S. at 831, 835; *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 648-49 (1980); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 759 (1976); *Hunt v. McNair*, 413 U.S. 734, 736 (1973); *Tilton v. Richardson*, 403 U.S. 672, 679-82 (1971). Of particular relevance here, in *Regan*, the Court upheld a state statute providing "direct cash reimbursement" to religious and secular schools for the costs of complying with various state testing requirements. 444 U.S. at 657. The Court was untroubled that the reimbursements involved cash, noting that it "'has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its resources on religious ends.'" *Id.* at 658 (quoting *Hunt*, 413 U.S. at 743). The Court of Appeals concluded that *Regan* "controls this aspect of the case." Pet. App. at 12a. Like the reimbursements in *Regan*, the $400 grants here "reimburse grantees for a portion of the costs they incur when complying with various AmeriCorps requirements." Pet. App. at 11a.

Petitioner seeks to distinguish *Regan* on two grounds, neither of which is persuasive or certworthy. First, petitioner argues that while *Regan* involved "reimbursement of state-mandated testing," what is at issue here is not reimbursement, but "aid." Pet. at 24. This assertion is simply baffling. It is undisputed that the $400 reimburses grantees for a portion of the extra costs imposed by the government in implementing the programs. As the Court of Appeals noted, "detailed AmeriCorps guidelines require, among other things, that grantees train participants, provide them with adequate supervision by qualified supervisors, keep various records, and make regular reports to the Corporation." Pet. App. at 11a. And while the reimbursement in *Regan* put participants in the "same position" they would have been absent a government testing requirement, Pet. at 24, the $400 per participant program here leaves AEAP grantees in a *worse* position, as $400 is "much less" than grantees' administrative expenses. Pet. App. at 12a. In any event, to the extent that the Court of Appeals' characterization of these funds as "reimbursement" was somehow misguided (which it was not), the point presents a factbound question of interest only to the present case and not meriting this Court's review.[10]

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[10] It is also constitutionally irrelevant that the schools in *Regan* had their expenses imposed on them by the state while AmeriCorps grantees such as Notre Dame have an initial choice as to whether to participate in AmeriCorps. Religiously affiliated organizations such as Notre Dame have a First Amendment right to participate equally with secular grantees in neutral government programs, and denying reimbursement to such organizations for mandated costs while providing it to secular ones would offend that command. *See, e.g., Mitchell*, 530 U.S. at 795 (Establishment Clause prohibits "disfavor[ing] religion"); *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status.").

Petitioner's second effort at distinguishing *Regan* focuses on the reporting and auditing requirements in place there and argues that the AEAP program lacks comparable restrictions. The Court of Appeals concluded that the small amount of the reimbursement as compared to the amount of administrative expenses would render such auditing "senseless" here, Pet. App. at 12a, — a conclusion that petitioner apparently views as too practical to be correct.

Here, as noted, there are both statutory and administrative prohibitions against diverting the $400 stipend to religious uses. The statute clearly provides that no Corporation funds may be used "to provide religious instruction, conduct worship services, or engage in any form of proselytization." 42 U.S.C. § 12634(a). Moreover, all AEAP grantees are required to sign a specific assurance that they will "ensure that no assistance made available by the Corporation will be used to support any . . . prohibited activities," including religious activities. JA0752-53, 0866, 0869. And all grantees at issue here have attested that no funds were so used. JA0721, 0723-24, 0887-89, 1068-69.

Nothing in *Regan* or the Court's other cases suggests that the government is constitutionally obliged to further "guarantee" adherence to such secular use restrictions by engaging in a burdensome and time-consuming audit where, as here, the modest administrative stipend does not come close to reimbursing the grantees for the government-imposed program costs. Nothing in the Court's precedent suggests that the "safeguards" used in *Regan* were the *exclusive* method for preventing direct aid from being diverted to religious use.

Apparently recognizing this, petitioner attacks a strawman. It says that there is a "*possibility*" that the opinion below "*implicitly* endorsed a rule of proportional financing," under which government funds can be spent for explicitly religious purposes, such as "religious pamphlets," as long as the total funding is less than the total secular

portion of the funded activity. Pet. at 23 (quoting Ira C. Lupu & Robert W. Tuttle, *Legal Analysis*, posted on the Roundtable on Religion & Social Welfare Policy, *available at* http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=34) (emphasis added). But the opinion below did not remotely endorse any such sweeping rule, implicitly or otherwise. It simply held, again, that it would be senseless to mandate an audit to merely confirm that the government-mandated costs exceed $400 per student where, as here, there are statutory and enforcement prohibitions against diverting that money to religious uses. It never held that such an administrative audit was unnecessary where there are no secular use restrictions, much less that religious uses are *permissible* if the public aid is less than the government-imposed costs. Thus, petitioner's attempt to hypothesize how the narrow holding below would play out if applied in *Bowen* — where the funding was not even arguably "reimbursement" and where there was *no* express statutory restriction of the funding to secular uses — is entirely beside the point. *See* Pet. at 23.

The other cases cited by petitioner, Pet. at 22 n.6, provide no assistance in evaluating whether auditing is required in this situation. *Roemer upheld* a program that featured both a "statutory prohibition against sectarian use and . . . administrative enforcement of that provision," *Roemer*, 426 U.S. at 759, which in no way suggests the statutory prohibition and grantee assurances here would be inadequate. *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), is entirely inapposite, because, as even the District Court recognized, "*Nyquist* does not govern neutral educational assistance programs." Pet. App. at 51a n.18 (quoting *Zelman*, 536 U.S. at 641). *Nyquist* was a *preferential* program designed to "provide desired financial support for nonpublic, sectarian institutions," *Zobrest*, 509 U.S. at 12-13 (internal citations omitted), and the aid was made without *either* statutory restrictions *or* administrative

monitoring to prevent the use of government funds for sectarian purposes. *See Nyquist*, 413 U.S. at 774.

Similarly undeserving of review is petitioner's argument that the Court of Appeals "improperly placed the burden of proof on AJC to show that the amount of the aid in fact exceeded the secular administrative costs of maintaining the program." Pet. at 25. As an initial matter, such a conclusion would be entirely consistent with this Court's precedents, which make clear that in direct aid cases, where funds are provided on a neutral basis and are restricted to secular uses, it is plaintiff's burden to prove *substantial, actual* diversion of government grants to religious activities. *Mitchell*, 530 U.S. at 864 (O'Connor, J., concurring in the judgment); *see also Hunt*, 413 U.S. at 744.

In any event, here too, this case would be an inappropriate vehicle for addressing the "burden of proof," given that AJC did not even *allege*, and produced "no evidence," that the $400 grants exceeded the programs' secular administrative costs. Pet. App. at 12a. The Court of Appeals did not rest on the mere "assumption," Pet. at 21, that the grants would exceed the grantees' administrative costs, it noted the *affirmative undisputed* evidence showing that very fact. Pet. App. at 12a.

Finally, while the Court of Appeals analyzed the $400 grants as direct aid under *Regan*, it did not address the arguments of the Corporation and Notre Dame that the grants were properly viewed instead as indirect funding which "reach[es] religious institutions only by way of the deliberate choices of numerous individual recipients." *Zelman*, 536 U.S. at 652. Here, unlike in the typical direct aid case, the administrative grants must be viewed as a product of private choice because they are intertwined with the education awards paid to individual students as a result of individual choices to serve through the ACE program. *Cf. McCallum*, 324 F.3d at 882 (parolee benefits analogous to vouchers even though state dispensed with "intermediate step" of giving

voucher to individual). Thus, this case does not even squarely present a question concerning the secular use safeguards required for true direct aid. And, to reach that question, the Court would first have to resolve the antecedent issue of whether aid to institutions stemming directly from private individual choice is judged by a different standard — an issue never reached by the court below.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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December 2, 2005

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[11] Finally, it should be noted that petitioner lacks standing to bring this action because it is not challenging an exercise of Congress' taxing and spending authority, but instead only action by the Executive Branch, which falls outside the very limited realm of cases permitting taxpayer standing. *See, e.g., In re United States Catholic Conference*, 885 F.2d 1020, 1028 (2d Cir. 1989); *Fordyce v. Frohnmayer*, 763 F. Supp. 654, 657 (D.D.C. 1991); *see also* University of Notre Dame's Appellate Brief, at 8-10. While this argument was rejected below, *see* Pet. App. 4a-6a, it will be necessary to resolve this jurisdictional issue if certiorari is granted.

APPENDIX

CODE OF FEDERAL REGULATIONS TITLE 45—PUBLIC WELFARE SUBTITLE B—REGULATIONS RELATING TO PUBLIC WELFARE CHAPTER XXV—CORPORATION FOR NATIONAL AND COMMUNITY SERVICE PART 2540—GENERAL ADMINISTRATIVE PROVISIONS SUBPART A—REQUIREMENTS CONCERNING THE DISTRIBUTION AND USE OF CORPORATION ASSISTANCE

Current through November 21, 2005; 70 FR 70481

§ 2540.100 What restrictions govern the use of Corporation assistance?

(a) Supplantation. Corporation assistance may not be used to replace State and local public funds that had been used to support programs of the type eligible to receive Corporation support. For any given program, this condition will be satisfied if the aggregate non-Federal public expenditure for that program in the fiscal year that support is to be provided is not less than the previous fiscal year.

(b) Religious use. Corporation assistance may not be used to provide religious instruction, conduct worship services, or engage in any form of proselytization.

(c) Political activity. Corporation assistance may not be used by program participants or staff to assist, promote, or deter union organizing; or finance, directly or indirectly, any activity designed to influence the outcome of a Federal, State or local election to public office.

(d) Contracts or collective bargaining agreements. Corporation assistance may not be used to impair existing contracts for services or collective bargaining agreements.

(e) Nonduplication. Corporation assistance may not be used to duplicate an activity that is already available in the locality of a program. And, unless the requirements of paragraph (f) of this section are met, Corporation assistance will not be provided to a private nonprofit entity to conduct

activities that are the same or substantially equivalent to activities provided by a State or local government agency in which such entity resides.

(f) Nondisplacement.

(1) An employer may not displace an employee or position, including partial displacement such as reduction in hours, wages, or employment benefits, as a result of the use by such employer of a participant in a program receiving Corporation assistance.

(2) An organization may not displace a volunteer by using a participant in a program receiving Corporation assistance.

(3) A service opportunity will not be created under this chapter that will infringe in any manner on the promotional opportunity of an employed individual.

(4) A participant in a program receiving Corporation assistance may not perform any services or duties or engage in activities that would otherwise be performed by an employee as part of the assigned duties of such employee.

(5) A participant in any program receiving assistance under this chapter may not perform any services or duties, or engage in activities, that—

(i) Will supplant the hiring of employed workers; or

(ii) Are services, duties, or activities with respect to which an individual has recall rights pursuant to a collective bargaining agreement or applicable personnel procedures.

(6) A participant in any program receiving assistance under this chapter may not perform services or duties that have been performed by or were assigned to any—

(i) Presently employed worker;

(ii) Employee who recently resigned or was discharged;

(iii) Employee who is subject to a reduction in force or who has recall rights pursuant to a collective bargaining agreement or applicable personnel procedures;

(iv) Employee who is on leave (terminal, temporary, vacation, emergency, or sick); or

(v) Employee who is on strike or who is being locked out.

[70 FR 39607, July 8, 2005]

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Supreme Court, U.S.
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No. 05-282

In The

Supreme Court of the United States

AMERICAN JEWISH CONGRESS,

Petitioner,

v.

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Petitioner American Jewish Congress ("AJC") submits this reply in support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

INTRODUCTION

Contrary to the holding of the Court of Appeals and the Respondents' briefs, the decisions of this Court have never held or suggested that the federal government may, as here, fund and sponsor parochial school teachers who teach religion to young schoolchildren and lead them in prayer. This Court's precedents directly prohibit providing federal aid to parochial school teachers who indoctrinate students in religion. *See Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 386-87, 397 (1985); *see also Lemon v. Kurtzman*, 403 U.S. 602, 606, 608 (1971).

The Respondents do not deny that *Ball*'s holding concerning the Community Education program has never been overruled. Rather, as did the Court of Appeals, they postulate that *Ball*'s reasoning has been eroded. The Court should not permit any doubt about whether this Court's precedents continue to prohibit the federal government to fund and sponsor parochial school teachers who teach religion to young schoolchildren, as in the challenged program. To guide Executive Branch action and the lower federal courts in this age of "faith-based" federal government initiatives, certiorari should be granted to clarify that this aspect of *Ball* remains good law.

Moreover, like the Court of Appeals, the Respondents fail to provide any convincing explanation as to why the government's discretion in awarding grants should be irrelevant to deciding if the government is sponsoring religion or merely giving effect to "private choice." The Court should grant certiorari to make clear that the government's discretion is relevant to that inquiry.

The Respondents also fail to justify the Court of Appeals' decision sustaining the Corporation's cash grants based on the theory that secular administrative expenses would exhaust the money. Certiorari should be granted to underscore that the existing precedents of this Court require monitoring of government grants — and not just statistical judgments — to ensure that the funds are used only for secular purposes.

COUNTER STATEMENT OF FACTS

By mischaracterizing the record, the Corporation seeks to avoid review by this Court of a federal program that the District Court correctly held was a violation of the Establishment Clause. Repeatedly in its brief, the Corporation describes the practice of AmeriCorps teachers inculcating the Catholic religion to elementary and secondary school children as being undertaken on teachers' "own time." Resp. Corp. Br. at I, 7, 10, 13. But the teaching of religion by individuals, heralded as having been sent to the schools and sponsored and funded by the federal Government, is in no sense done on the teachers' own time. Rather, the religious instruction is given in the midst of the school day, in the same classroom before the same students and by the same person that just before and just after the religious lesson was teaching them reading, writing and arithmetic. *See* Pet. Br. at 7.

Nor is the program in any fair sense the result of the "private choice" of the individual AmeriCorps teacher, as Respondents' briefs would have this Court believe. As the District Court recognized, the teaching of religion in parochial schools by AmeriCorps teachers is the direct result of the calculated and deliberate federal program. Pet. App. at 15a. Year after year, the Corporation, in the exercise of its

unfettered discretion, gives millions of federal taxpayer dollars to Catholic and other Christian organizations which in turn recruit, train and place recent college graduates and others in parochial schools around the country where they teach religion and secular subjects and thereafter receive direct funding from the federal government for their service. JA0234, 0299, 0383, 0440, 1303-04. After receiving such federal funds each year, these organizations — such as the University of Notre Dame — train the recruited college graduates in how to impart their Christian faith in all of their pedagogy. *See* Pet. Br. at 4-5. These organizations are not required to account for a single penny of their federal funds. *See id.* at 8. The Corporation asks only that the teachers they place in parochial schools not record on their timesheets any of the time they have spent teaching religion.[1]

This is in no sense like the voluntary voucher program, where the choice is made by each family where to send its children to school. It is a Government program that any fully informed, reasonable observer would conclude is using federal tax dollars to teach religion to impressionable young school children — children who have no idea whether the teacher is recording time spent teaching religion in submissions to the Government in order to receive the federal funding for his or her service in the school.

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[1] Even if it were adequately enforced, the Corporation's instruction that AmeriCorps teachers placed in sectarian schools keep "timesheets" provides no meaningful constitutional safeguard. Nevertheless, it is noteworthy that the District Court found the Corporation's efforts at monitoring such timekeeping "totally inadequate" and "clearly insufficient" based on the record and in light of this Court's precedents. Pet. App. at 47a-48a.

ARGUMENT

I. *AGOSTINI* DID NOT OVERRULE THE PORTION OF *BALL* CONTROLLING THIS CASE

The relevant holding in *Ball* striking down the Community Education program remains in force. *See Agostini v. Felton*, 521 U.S. 203, 235, 237 (1997). In an attempt to justify the Court of Appeals' departure from that holding, the Corporation argues that the "rationale" of *Ball* was "expressly rejected" in *Agostini*. Resp. Corp. Br. at 10. However, this Court has directed that its holdings must be followed even if a lower court believes that they "rest on reasons rejected in some other line of decisions," thereby "leaving to this Court the prerogative of overruling its own decisions." *Agostini*, 521 U.S. at 237 (quotation omitted). To the extent that the Court of Appeals or Respondents believe that *Ball* should no longer have vitality, certiorari should be granted to consider whether it should be overruled — or, as we submit, whether it should remain binding authority.

In arguing that *Agostini* has undermined the reasoning of *Ball*, the Corporation elides the key distinction between the Community Education program struck down in *Ball* and the Shared Time program subsequently found to be constitutional in *Agostini*: that in the former program, the teachers engaging in government-supported secular instruction were the same parochial teachers who indoctrinated students in religion as part of their sectarian school duties. The presumptions rejected in *Agostini* that "public employees will inculcate religion simply because they happen to be in a sectarian environment" and that "properly instructed public employees will fail to discharge

their duties faithfully," Resp. Corp. Br. at 10 (quoting *Agostini*, 521 U.S. at 234), have no relevance when the teachers at issue are full-time sectarian school teachers. AJC need not rely on any such presumptions about whether indoctrination will occur here because it is undisputed that federally funded AmeriCorps teachers *are* instructing elementary and secondary school students in religion.

Under these circumstances, AJC's concern is not that a "symbolic union" has been created by the mere *presence* of government teachers on parochial school grounds. *See Agostini*, 521 U.S. at 223. The constitutional violation here is that young and impressionable students are being indoctrinated in religion by teachers who are supported and sponsored by the federal government. That constitutional infirmity is exacerbated by the government's policy of affirmatively encouraging AmeriCorps teachers to affiliate themselves with the program in their teacher placements, such as by posting signs and banners in the schools and classrooms where they are teaching religion. Pet. App. 23a.[2]

The Corporation attempts to whitewash this fundamental constitutional violation by instructing AmeriCorps teachers not to record on "timesheets" any of their religious activities. The Corporation's attempt to gerrymander the AmeriCorps participants' nine-to-twelve month term of service as teachers in parochial schools so as to exclude religious instruction does not cure the problem.

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[2] Particularly given that AmeriCorps teachers' religious instruction may occur even within the same classroom period as the secular instruction that the government acknowledges it is sponsoring, the Corporation's improbable proscription against teachers wearing AmeriCorps logo clothing while teaching religion does not remedy the fundamental constitutional problem. *See* Resp. Corp. Br. at 4 (citing 45 C.F.R. 2520.30(b)).

The young students being indoctrinated in religion are not privy to their teachers' timesheets. Even the Corporation itself almost never reviews them. Pet. App. 28a.

As noted, this suit is not about what is done on the teachers' "own time." Resp. Corp. Br. at 13. Despite the Corporation's statement to AJC that "the Corporation ... does not allow AmeriCorps members to teach religion," JA0451, the AmeriCorps teachers' religious indoctrination takes place during the same school day, in the same classrooms, and may even be intermixed within the same classroom period as their secular instruction. Pet. App. 31a, JA1428. Contrary to Respondents' unwarranted suggestion, Resp. Corp. Br. at 13, Resp. Notre Dame Br. at 12-13, AJC is not therefore arguing that it is unconstitutional for AmeriCorps teachers to attend church or synagogue on the Sabbath, teach Sunday school or lead religious youth groups on evenings or weekends, or otherwise to practice their religious beliefs outside of their AmeriCorps placements.[3]

II. THE DEGREE OF GOVERNMENT DISCRETION SHOULD BE CONSIDERED WHEN DETERMINING IF A PROGRAM IS ONE OF "TRUE PRIVATE CHOICE"

Certiorari should also be granted to make clear that government discretion in awarding grants is relevant to whether a program is one of private choice. Even the plurality opinion in *Mitchell* recognized as much. *Mitchell v.*

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[3] There is no merit to the Corporation's argument that *Ball* is inapplicable because AmeriCorps members are not federal employees. Resp. Corp. Br. at 11. The constitutional analysis does not turn on formalities of agency or employment law but on whether the AmeriCorps members' religious indoctrination could "reasonably be attributed to governmental action." *Mitchell*, 530 U.S. at 809 (plurality).

Helms, 530 U.S. 793, 810 (2000) (plurality) ("[I]f numerous private choices, *rather than the single choice of a government*, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.") (emphasis added). Yet the Court of Appeals gave no weight to the role of the government's discretion in this program. Pet. App. 8a.

The Corporation's argument that the Court has previously upheld cases involving "a degree" of subjective judgment does not weigh against granting certiorari. Resp. Corp. Br. at 14. To the extent there was any government discretion in the programs at issue in *Zelman* and *Mitchell*, it was not like the essentially unbridled discretion of the Corporation to choose its grantees in this program. *Compare Zelman v. Simmons-Harris*, 536 U.S. 639, 645 (2002) (permitting exclusion from the grant program if schools advocate unlawfulness or teach racial hatred) and *Mitchell*, 530 U.S. at 846 (O'Connor, concurring) (expenditures must be pro rata based on relative enrollment and equitably distributed among public and private schools) *with* Pet. App. 43a-44a (District Court stating that "the Corporation uses highly discretionary criteria ... to pick and choose among potentially qualifying AmeriCorps EAP grantees.").[4]

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[4] In *Witters*, the respondent raised the argument that the program at issued "requir[ed] government choices at every step of the rehabilitation process ... and intertwin[ed] governmental decisionmaking ... with decisionmaking by church and school authorities." *Witters v. Washington Dep't of Svs. for the Blind*, 474 U.S. 481, 486 n.3 (1986). However, because the facts concerning that argument were not developed in the record below, the Court explicitly stated that "we have no occasion to consider the argument here." *Id.*

The circumstances of this case exemplify why the degree of the government's discretion is relevant. Here, the placement of AmeriCorps participants as religion teachers is the result of the government's deliberate decision to select and fund "faith-based" groups that promote religious instruction. For example, one of the "pillars" of the Notre Dame ACE program is "spirituality" and ACE conducts a summer teacher training program during which classes such as "Becoming Educators in Faith: Catechesis in Catholic Schools" and "Teaching Religion in Catholic Schools" are offered. Pet. App. 25a, JA0704. When the government chooses such a group as a grantee, instructs the religious group to recruit and train AmeriCorps teachers, and provides the group with cash funding to help it do so, the program adherents' religious instruction in their AmeriCorps placements is reasonably attributable to the government's choices.

III. THE COURT OF APPEALS' DECISION PERMITTING DIRECT FUNDING OF RELIGIOUS GROUPS WITHOUT REQUIRING ANY MONITORING OR ACCOUNTING OF THE FUNDS IS CONTRARY TO ESTABLISHED PRECEDENT

The Court of Appeals' decision upholding the payment of millions of dollars to religious grantees based on the justification that the grant funds would be exhausted by secular administrative expenses is not supported by *Regan* or any other precedent of this Court. *See Comm. for Pub. Educ. & Rel. Liberty v. Regan*, 444 U.S. 646 (1980).[5]

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[5] The Corporation does not attempt to rebut AJC's argument that the Court of Appeals' rationale is contrary to the Court's remand in *Bowen*. *See* Pet. Br. at 23-24 (citing *Bowen v. Kendrick*, 487 U.S. 589, 621

The Corporation argues that *Regan* permits religious groups to receive cash "reimbursements" for "expenses that they incur as a result of a secular governmental program." Resp. Corp. Br. at 17. However, *Regan* did not involve a government aid program such as the one at issue here — it involved reimbursements for state-*mandated* expenses imposed on all schools. *Regan*, 444 U.S. at 650-51.

Although the program in *Regan* required extensive recordkeeping of the government's payments, the Corporation further argues that such recordkeeping is unnecessary here because of the "small amount of money at issue." Resp. Corp. Br. at 18.[6] Given that just one of the religious groups funded by the Corporation was paid more than $3 million in taxpayer funds over the first four years of its grant, the funding at issue is not *de minimis*. JA0234,

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(1988)). Respondent University of Notre Dame (whose brief in large part merely reiterates the arguments asserted by the Corporation) argues that analogies to *Bowen* are misplaced because there was "*no* express statutory restriction" in *Bowen* against religious use of the government funds. Resp. Notre Dame Br. at 28 (emphasis in original). However, in *Bowen* there *was* a statutory "mechanism whereby the Secretary can police the grants that are given out under the Act to ensure that federal funds are not used for impermissible purposes." *Bowen*, 487 U.S. at 615. The remand in *Bowen* supports the view that monitoring of grants is a necessary, but not sufficient, constitutional prerequisite to government funding of religious groups.

[6] The Corporation's suggestion that it does monitor these grants is contrary to the evidence it submitted below. *Compare* Resp. Corp. Br. at 18 (arguing that "monthly interactions between AmeriCorps monitors and sponsors, as supplemented by annual inspections" are adequate safeguards) *with* JA0748 (declaration of Corporation officer that the Corporation "does not require grantees to account for the uses of these funds") (quoted by District Court at Pet. App. 34a). The Court of Appeals thus did not rely on any purported monitoring to sustain the grants. Pet. App. at 12a.

0299, 0383, 0440, 1303-04. The government should require appropriate safeguards to ensure that these substantial funds are not being used to finance religion — and certiorari should be granted to reject the Court of Appeals' unprecedented conclusion to the contrary.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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